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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XII.

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AMERICAN STATE REPORTS.
VOL XII

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]

MUDGE v. STEINHART.

[78 CALIFORNIA, 34.]

COLLATERAL ATTACK ON AN ATTACHMENT CAN NEVER BE SUSTAINED FOR CAUSES which do not render the writ absolutely void, and not merely voidable.

A WRIT OF ATTACHMENT CAN HAVE NO FORCE UNLESS ISSUED in an action on a contract express or implied.

WRIT OF ATTACHMENT IS NOT A LAWFUL PROCESS OF THE COURT, and therefore cannot be invoked to sustain the jurisdiction of the court, when it appears from the final judgment that the plaintiff had no cause of action against the defendant upon any contract express or implied.

ATTACHMENT, WHEN WILL NOT SUPPORT JUDGMENT. — If the defendant is a non-resident of the state, and has not entered his appearance in the action, a judgment for the sale of his attached property cannot be maintained where the recovery against him is only upon a cause of action for which no attachment could lawfully issue.

SERVICE OF SUMMONS BY PUBLICATION. — Deposit of summons and complaint in the post-office at the place where the attorney for plaintiff resides and has his office, instead of in the post-office where the order of publication was made, is not improper.

PRACTICE. — THE AMENDED COMPLAINT TAKES THE PLACE OF THE ORIGINAL, and is therefore the proper pleading to deposit in the post-office where the service of process is made by publication.

McAllister and Bergin, and W. B. Sharp, for the appellant.

William Matthews, for the respondents.

SEARLS, C. J. This is an appeal by William Scholle, one of the defendants, from a final judgment in the above-entitled cause, subjecting certain real property, situate and being in the

city and county of San Francisco, to sale, to satisfy claims of the several firms, and a corporation composing the parties plaintiff.

Defendant Scholle, the appellant, was, at the date of the complaint, a non-resident of the state of California, and a resident of New York City, in the state of New York. The summons was served upon him by publication, and no answer having been filed by or for him, judgment was taken by default.

It appears from the judgment that certain real property of appellant in the city and county of San Francisco had been, before the service of summons, attached to satisfy the demands and costs of the plaintiffs in the action, and the extent of the judgment, as against appellant, is to decree this real property to be sold to satisfy the amount found due from him to the plaintiffs.

Various objections are urged by appellant to the validity of the judgment, among which are: 1. That the relief granted by the court is other and different from that prayed for in the complaint; 2. That as against appellant there was no proper service of summons, by publication or otherwise; 3. That the case was not one in which a writ of attachment could issue, and as this was the only basis of jurisdiction against appellant, the judgment cannot be upheld.

As the last-named objection seems the most important, we will consider it first.

The allegations of the amended complaint, the prayer for judgment, and facts as to service of summons essential to an understanding of the foregoing points, may be stated thus:—

The firm of Feist, Frank, & Co., composed of Adolph Feist, Abraham Frank, Jacob Levy, and Israel Steinhart, were engaged in business in San Francisco, and as such firm purchased goods, wares, and merchandise from the several firms, etc., the plaintiffs herein, all of whom were New York merchants. Being largely indebted for goods thus purchased, the firm of Feist, Frank, & Co., for the purpose of cheating and defrauding their creditors by collusion with appellant and the other defendants herein, and without consideration, made a large number of promissory notes for various large sums of money to various persons, who conspired with them to accomplish the result in view.

Numerous actions were instituted in this state against Feist, Frank, & Co., among which was one by appellant and others.

upon eight of said pretended and fraudulent promissory notes, for the sum of \$24,124.42, in which action a writ of attachment issued, and was levied upon the property of Feist, Frank, & Co. Judgment was obtained by appellant and his associates, and an execution issued, under which property of the value of two hundred thousand dollars was sold, and purchased by the appellant in the name of one of the other defendants.

Plaintiffs had obtained judgments against the firm of Feist, Frank, & Co., who are insolvent, before the institution of this action.

The amended complaint herein contains full and ample charges of fraud on the part of appellant, whereby, as is averred, he obtained large sums of money from the firm of Feist, Frank, & Co., and contains most of the essential allegations of a creditor's bill.

An order was made by the superior judge of Santa Clara County, on the fifteenth day of February, 1884, directing the service of summons as against appellant by publication, and directing a copy thereof, and of the complaint, to be forthwith deposited in the post-office, directed to appellant at New York City, etc. An amended complaint had been before that time filed, a copy of which, with the copy of summons, was, on the same day, viz., February 15th, deposited in the post-office at San Francisco, the place of residence of plaintiff's attorney, directed to appellant, etc., as by the order required.

The appellant, being a non-resident of the state of California, and not having been served with summons except by publication, and not having appeared in the action, we must, in order to uphold the judgment, be able to see that the appellant had property in this state which was brought within the control of the court, and subjected to its jurisdiction by process adapted to that purpose, or that the judgment was sought as a means of reaching such property.

Recurring to the complaint, we find respondents sought by the allegations and prayer to obtain a personal judgment against appellant, and to subject to the satisfaction of that judgment certain real property in Santa Clara County, averred to have been purchased with the fruits of appellant's fraudulent acts. In this, respondents failed, and their judgment only decreed the sale of a lot of land in San Francisco, which had been levied upon and brought within the jurisdiction of the court under a writ of attachment issued in the cause.

The contention of appellant is, that inasmuch as the action

is clearly one in tort, and not founded in contract, express or implied, the attachment was improperly issued, and that its levy created no lien which the court could enforce.

In discussing the jurisdiction of the court over property of non-residents not personally served, the supreme court of the United States, in *Cooper v. Reynolds*, 10 Wall. 319, used the following language: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established."

This language has been quoted and approved in many of the cases which have followed it, including *Pennoyer v. Neff*, 95 U. S. 714.

The question presented for consideration is, Was the writ of attachment in this case the lawful writ of the court?

An appeal lies from an order dissolving, or refusing to dissolve, an attachment (Code Civ. Proc., sec. 963); hence irregularities, merely, in its inception, or as to its form, cannot be considered here, being subjects of direct attack by such appeal.

This may be regarded as a collateral attack, which can only be sustained for causes which render the writ absolutely void, and not merely voidable: *Pennoyer v. Neff*, 95 U. S. 714.

With the antiquity and scope of writs of attachment as they existed in the lord mayor's court of London, we have nothing to do.

In this state the writ depends for its force upon the statute, and being merely a statutory provision, it can have no force except in the cases provided by the statute.

Under section 537 of the Code of Civil Procedure, the writ can only issue "in an action upon a contract, express or implied": *Walker v. McCusker*, 65 Cal. 360.

The existence of a contract, express or implied, is an essential basis, without which no writ of attachment can properly

issue; and as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void, and cannot be invoked to uphold the jurisdiction of the court.

In such a case the writ cannot be said to be the lawful writ of the court.

The rule as enunciated by this court in *Belcher v. Chambers*, 53 Cal. 635, and in the cases cited *supra*, may be stated thus:—

1. A personal judgment of a state court against a non-resident who has not been personally served, and who has not appeared in the action, is without validity.

2. The state, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him, and her courts may inquire into his obligations to the extent necessary to control the disposition of such property; and in such a case service of summons by publication, or other form authorized by the law of the state, is sufficient to inform the non-resident of the object of the proceedings, provided the court obtains jurisdiction of the property by seizure, or some equivalent act, *in rem*, or in the nature of a proceeding *in rem*, the object being to enforce proceedings against the property.

Manifestly, as we think, the process by which jurisdiction over the property is obtained must be one known to the law, as, for instance, by direct proceedings to declare and enforce a lien upon the property, or in a case warranting a writ of attachment, by such writ, etc. In the present case we may suppose the object of the action was to follow up and enforce a lien upon the real estate in Santa Clara County, and that to that extent the court acquired jurisdiction to act, but, failing in that, it does not follow that respondents could resort to a writ of attachment, and thus confer jurisdiction upon the court to condemn other property, and that in a case where a writ of attachment could not under any circumstances properly issue.

As to the other objections, it may be said briefly that the relief granted, being other and different from that prayed for in the complaint and specified in the summons, was improper.

“The relief granted to the plaintiff, if there be no answer, cannot exceed that which shall have been demanded in the complaint”: Code Civ. Proc., sec. 580.

The deposit of the summons and complaint in the post-office at San Francisco, where the attorney for plaintiffs resided and

had his office, instead of the post-office at San José, where the order of publication was made, was not improper, and the amended complaint, which took the place of the original, and was the existing pleading on the part of plaintiffs, was the proper pleading to deposit under the order.

The judgment of the court below is reversed, and the cause remanded.

ATTACHMENT. — A return on an attachment is sufficient, as against a collateral attack, when it states that the officer “duly levied upon all the right, title, and interest of the defendant in and to the following realty, to wit,” describing the realty attached: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Porter v. Pico*, 55 Cal. 174.

JUDGMENTS AGAINST NON-RESIDENTS: See *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34, and note 41; *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666, and note 674, 675.

ATTACHMENT — NON-RESIDENTS — RECENT CASES. — Attachment proceedings against non-residents are regulated and governed by statute, and such statutory provisions must be strictly adhered to: *Randle v. Mellen*, 67 Md. 181. The affidavit for attachment against a non-resident need not state that he has property in the state subject to attachment: *Kenney v. Goergen*, 36 Minn. 190. In a proceeding to attach one of several joint obligors, the non-residence of the other obligors must appear in the affidavit: *Corbet v. Corbet*, 50 N. J. L. 363. A homestead cannot be attached on the ground of non-residence, when it appears that defendant and his wife have left the state on account of the latter's health, but intend to return to their homestead: *Garlinghouse v. Mulvane*, 40 Kan. 428. An attachment against a non-resident commenced by publication is good and valid, although such publication is suspended before it is completed, where it appears that defendant appeared and consented to judgment against himself: *Tuller v. Beck*, 108 N. Y. 355.

[IN BANK.]

MOYLE v. LANDERS.

[78 CALIFORNIA, 99.]

SERVICE OF NOTICE OF APPEAL UPON AN ATTORNEY AFTER THE DEATH OF HIS CLIENT cannot bind the representatives of the latter, because the authority of the attorney terminates with the life of his client.

ESTOPPEL TO OBJECT TO SERVICE OF NOTICE OF APPEAL. — If one who has been an attorney for the defendant in an action accepts service of notice of appeal after the death of such defendant, the party making such service being ignorant of such death, and if such attorney being afterwards retained by the representatives of the deceased defendant, by concealing the fact of such death, and by the failure to object to the jurisdiction of the appellate court at the proper time, and for the fraudulent purpose of preventing the proper service of such notice, delays making objection until it is too late to remedy the defect, the representatives of the deceased are estopped from contending that such notice was not properly served.

L. E. Bulkeley, for the appellants.

D. L. Smoot and H. G. Sieberst, for the respondents.

WORKS, J. This is an action to recover a money judgment, and to declare a trust in certain real estate. There was judgment on demurrer for the defendants in the court below, and the plaintiffs appeal. The defendant Michael Landers died after judgment.

One Sieberst appeared as attorney for all the defendants during the proceedings in the court below. The death of Landers occurred October 20, 1886. The notice of appeal was served on said Sieberst on the 21st of the same month. Sieberst, without disclosing the fact of Landers's death, if he knew it, acknowledged service of the notice as attorney for all of the defendants. In this court there was a suggestion of the death of the defendant Landers by the appellants, and upon their motion, the respondents, Amy Landers, wife of said Michael Landers, and William J. Landers, his brother, who had been appointed administratrix and administrator of said estate, were substituted as parties in his stead. The said personal representatives now move the court to dismiss the appeal herein as to them, on two grounds: 1. On the ground that the service of the notice of appeal on Sieberst was no service as to the defendant, who was then dead; 2. That the appeal bond is insufficient.

1. It must be conceded that the question is one of jurisdiction, and that, independent of any acts or conduct on the part of said respondents estopping them to question the jurisdiction of the court, it must be shown that notice of appeal was served as provided by law. The authority of Sieberst as attorney for Landers ceased with the death of the latter, and service of the notice upon him and his acknowledgment of such service could not bind the personal representatives subsequently appointed: *Judson v. Love*, 35 Cal. 463. And if this were the only question presented, the appeal should be dismissed: *Shartzer v. Love*, 40 Id. 93; Hayne on New Trial, sec. 210, p. 631.

There was no service of notice of any kind upon the personal representatives, or either of them, before or after the order of substitution of them as respondents, which order was made and entered September 26, 1887.

The appellants meet the motion by an affidavit of the ap-

pellant Moyle, which alleges the service of the notice of appeal on Sieberst, who indorsed thereon: —

“Service and receipt of a copy of the within notice of appeal, after filing, is hereby admitted, this twenty-first day of October, 1886.

“H. G. SIEBERST,

“Attorney for Defendants, Respondents.”

And alleges further that “W. J. Landers and Amy Landers were respectively duly appointed and qualified as administrator and administratrix of the estate of Michael Landers; that soon thereafter, and on or about the 27th of November, 1886, at the request of W. J. Landers, administrator, he, deponent, went to his office, and he then stated that his object in wishing me to call was to talk about a settlement of this suit, so far as the administrator and administratrix were concerned. After considerable conversation, he fixed another time, a few days later, saying that he wished to talk further with H. G. Sieberst and D. L. Smoot, the attorneys; at the second time, he said that it had been decided to make a settlement with us, but it could not be consummated until after ten months had expired, so that no other parties could come in and make a claim on similar grounds, and requested me to keep quiet and give myself no further trouble about the appeal. He also stated that as administrator and administratrix they had retained H. G. Sieberst as their attorney and counsel, to appear for them, to attend to this suit in the supreme court, and for no other purpose, and had paid him his fee, which was one thousand dollars; that D. L. Smoot had also been retained by them in other matters connected with the estate, and that he advised with the said Smoot in this and in all matters pertaining to the estate.

“Deponent further says that said W. J. Landers asked deponent for a copy of the transcript on appeal herein, which deponent gave to him; that on the 3d of June, 1887, and within seven months after the first publication of notice to creditors of the estate of Michael Landers, I served upon said W. J. Landers, administrator, a duly verified creditor’s claim against said estate, which contained, in substance, the complaint in this action, and enumerated all the several sums of money therein alleged to have been fraudulently obtained from plaintiffs by said Landers in his lifetime, and the total amount and interest claimed against the estate by reason thereof, and the parcels of real estate which had been pur-

chased in said Landers's name with the funds thus fraudulently obtained, and a statement that this suit, therefore, was still pending and undetermined; that at this time I asked said Landers, administrator, for an admission of service of said paper, but he said he desired to submit it to D. L. Smoot, their attorney, for his instructions; that several times after this I called on him for said admission of service, and he each time told me that said Smoot had not returned it to him.

"Finally, on September 14, 1887, and before the expiration of the ten months after first publication of notice to creditors of said estate, I delivered to him another exact copy of said creditors' claim, duly verified, specifying the amount claimed in the pending suit then on appeal in the supreme court, and on that date I obtained his written admission of service, in the following words and figures, to wit:—

"I acknowledge the presentation of the within claim to me as administrator of the estate of Michael Landers, deceased, this fourteenth day of September, 1887, at San Francisco, California.

"WILLIAM J. LANDERS, Administrator.

"Deponent further says that on July 16, 1887, and before the expiration of the ten months allowed by law for the presentation of claims against the estate of Michael Landers, he delivered to Mrs. Amy Landers, administratrix, personally, at her residence, 812 Shotwell Street, in the city of San Francisco, and left with her an exact copy of the said creditors' claim, and referred to the suit then and now pending on appeal in the supreme court above specified.

"Deponent further says that H. G. Sieberst, at the time of Michael Landers's death, and for a long time prior thereto, had been his intimate friend, had his office on the same floor with him, and was in the habit of meeting him daily at his office or at his dwelling; and if said Michael Landers died on the twentieth day of October, 1886, of which this deponent then had no intimation, and has now no personal knowledge, said Sieberst knew of his death when he signed the admission of service of notice of appeal for him and his co-defendants, and purposely concealed the fact from deponent. And deponent never did for a moment suspect that said Michael Landers was dead at the time he received said admission of service from Sieberst, nor that it was so claimed until he saw it in Sieberst's affidavit on which he based his first motion to dismiss the appeal in December, 1887.

“And deponent is informed and believes, and upon such information and belief states the fact to be, that said D. L. Smoot knew as early as June, 1887, of the deceit practiced by said H. G. Sieberst in giving admission of service of notice of appeal, and that said Smoot counseled and advised with the said administrator and administratrix upon the subject, and it was agreed between them to remain quiet, and give no intimation to plaintiffs, appellants, of the time when said Michael Landers died, until after the time had expired in which further notice of appeal could be made on them; that all of them aided and assisted and conspired with said Sieberst to carry out the deception and fraud thus initiated by said Sieberst, and that the said Smoot and W. J. Landers, administrator, and Amy Landers, administratrix, have been in collusion at all times on the subject.

“That on the ninth day of December, 1887, when the former motion was made by H. G. Sieberst to dismiss the appeal, W. J. Landers, administrator, was in the court-room and heard the statement in an affidavit of appellants' counsel that he and Amy Landers had been substituted as respondents in this appeal by order made September 26, 1887, and that no objection had been made thereto, and in fact no one ever did make any objection to said substitution, although the said administrator and administratrix knew of it on the 28th of September, 1887.

“Affiant further states that he has examined the records of the probate court, and the value of the estate of Michael Landers, deceased, is appraised at \$120,330.08, of which \$104,880 is in real estate, nearly all of which is claimed by the complaint herein as property purchased with funds embezzled from the plaintiff, and said Amy Landers, administratrix, is the heir to one half of said estate, and she is now in the possession and enjoyment of the same as administratrix, no distribution having been made of the property of said estate.

“Deponent further says that subsequent to the substitution of the administrator and administratrix as respondents herein, and in pursuance of the provisions of section 954 of the Code of Civil Procedure, the appellants caused to be executed a new undertaking on appeal herein, which was approved by the chief justice of this court, and filed with the clerk on the twenty-fourth day of October, 1888.”

Counsel for appellants also makes affidavit that he left this state for the east September 29, 1886, and did not return until

January 14, 1887; that before leaving he prepared the necessary notice of appeal; that within a few days after his return he examined the transcript, and saw Sieberst's acknowledgment of service of the notice as attorney for all the defendants; that he learned of Landers's death soon after his return, but did not then know, nor did he at any time learn or receive any information, that he was dead at the time the notice was served, until December 5, 1887, when he was so informed by the affidavit of Sieberst in this case; that the order of substitution was made as above stated, and notice of such proceeding was published in the newspapers of the city where said parties resided, and that no objection has ever been made to such substitution.

Mr. Smoot, one of the attorneys mentioned in appellants' affidavit, files his sworn denial of the statements contained therein so far as they apply to him, and also denies all knowledge of any attempt or intent to deceive the appellants or their attorney in the matter of the service of said notice of appeal. All that can be said, therefore, so far as Mr. Smoot is concerned, is, that he may be attempting to profit by the wrong of another.

The respondent W. J. Landers files his affidavit, substantially denying the charges made in appellants' affidavit, so far as they refer to himself, and alleges generally that he has done nothing to prevent the appellants from ascertaining the death of Landers when the alleged service of notice occurred.

So far as the appellants' affidavit charges fraudulent conduct and intent as to Sieberst and Amy Landers, it remains wholly unanswered. We must, therefore, treat them as so far confessed.

These are grave charges, involving the professional honor and integrity of an attorney, and if untrue would undoubtedly be met by a denial.

Sieberst was the attorney for Landers. After the appointment of his personal representatives, he continued to act as their attorney. As shown by the affidavit, he knew, while acting as the attorney for the latter, that they had, by the order of this court, been substituted as respondents in place of Landers, and being present in court, made no objection and remained silent until it was too late for appellants to serve and file a new notice. Having then become the attorney for the personal representatives, he had authority to bind them. Not only so, but it is directly charged, and not denied, that his

silence was for the fraudulent purpose of defeating appellants' appeal, and that the administratrix was a party to such fraud.

To allow this motion to prevail under such circumstances would be a travesty on justice, and bring the administration of the law into just reproach.

We are met with the claim, on the part of the respondents, that this is a purely jurisdictional question, that this court can only obtain jurisdiction in the way provided by law, and that it cannot be conferred by the consent or voluntary submission of the parties, and in support of this contention they cite *Bonds v. Hickman*, 29 Cal. 462; *Judson v. Love*, 35 Id. 466; *Shartzer v. Love*, 40 Id. 96; *Reed v. Allison*, 61 Id. 465.

As we have already said, the rule stated in these cases must be conceded to be the true one, but in our judgment they do not meet the case presented here.

There was no question of fraud in either of the cases cited. The appellant simply failed to take the necessary steps to perfect the appeal, and in one of the cases there was a stipulation that the notice had been given, but this was contradicted by the certificate of the clerk and affidavit. We think it may very properly be questioned whether an express stipulation of the parties, waiving the steps necessary to perfect an appeal, or that such steps have been taken, made in good faith, should not be binding upon them, and confer jurisdiction: *Hayne on New Trial*, sec. 210, p. 642, and cases cited.

But this is not the question before us. The question here is, whether parties who have fraudulently prevented the service of the notice, by the concealment of material facts, and by a failure to enter their objection to the jurisdiction of the court at the proper time, and for the fraudulent purpose of preventing the proper service of the same have delayed making their objection until it was too late to remedy the defect, should not now be estopped to attack the notice given, or to question the jurisdiction of the court.

We are of the opinion that the respondents should not now be heard to question the jurisdiction of this court for the want of the service of a proper notice of appeal under the circumstances of this case.

2. The respondents contend further that the appeal should be dismissed because the undertaking on appeal was insufficient. The appellants meet this by showing that a new undertaking has been filed in this court. This latter undertaking

is also attacked on various grounds, based however upon the theory that this court had not obtained jurisdiction of the case.

It might be conceded that if no notice of appeal had been given, the undertaking would be ineffectual for any purpose, but as we have ruled against the respondents upon the point which forms the basis of their objections to the undertaking, the latter must be held to be without foundation.

Motion denied.

AGENCY — REVOCATION BY DEATH. — An attorney's authority is revoked by his client's death: See note to *Cassiday v. McKenzie*, 39 Am. Dec. 91, and cases there collected. The death of the principal operates as an instantaneous and absolute revocation of his agent's authority: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 648; *Rigs v. Cage*, 2 Humph. 350; 37 Am. Dec. 559; *Doe v. Smith*, 1 Jones, 135; 59 Am. Dec. 581; *Staples v. Bradbury*, 8 Greenl. 181; 23 Am. Dec. 494; *Harper v. Little*, 2 Greenl. 14; 11 Am. Dec. 25; *Lehigh Coal etc. Co. v. Mohr*, 83 Pa. St. 228; 24 Am. Rep. 161; but this is not so where the authority of the agent is coupled with an interest: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Staples v. Bradbury*, 8 Greenl. 181; 23 Am. Dec. 494; compare the extended note to *Cassiday v. McKenzie*, 39 Id. 81-91, as to the effect of the principal's death upon the relation between the principal and the agent: *Prior v. Kiso*, 96 Mo. 303.

ESTOPPEL, WHAT IS, AND WHAT ARE THE ESSENTIALS OF: See *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and particularly note 597, with the cases there collected; *Oook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17. As to estoppel by the acts and representations of an agent: *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Wheeler v. McGuire*, 86 Id. 398; *German Savings Institution v. Jacoby*, 97 Mo. 617.

[IN BANK.]

LAWRENCE v. GAYETTY.

[78 CALIFORNIA, 123.]

MISREPRESENTATIONS, TO CONSTITUTE SUFFICIENT GROUNDS FOR ORDERING THE CANCELLATION OF A DEED, must be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future.

MERE PROMISE IS NOT, STRICTLY SPEAKING, A REPRESENTATION.

MAKING A PROMISE WITH NO INTENTION AT THE TIME OF PERFORMING IT constitutes a fraud for which a contract may be rescinded.

MERE FAILURE TO PERFORM A COVENANT DOES NOT RELATE BACK to and render the same fraudulent.

CONVEYANCE OF REAL ESTATE CANNOT BE SET ASIDE AS FOR A FAILURE OF CONSIDERATION, in the absence of fraud, on the sole ground that the promises and agreements which enter into its execution, and which by the terms of the contract under which a deed is made were not to be per-

formed until after its execution, have not been performed. The fact that the promises were to make improvements, and to expend money in the development of the mine, which is the subject-matter of the conveyance, does not render this rule inapplicable.

Van Ness and Roche, for the appellants.

J. M. Fulweiler and Jo Hamilton, for the respondent.

WORKS, J. Action to set aside two deeds by the plaintiff to the defendants of a mining claim owned by him, on the ground of fraud and failure of consideration. The complaint avers, in substance, that the plaintiff was the owner of the mine, and was poor and unable to furnish the necessary machinery and mills to develop the same; that the property was, at the time of the conveyance, of the value of ten thousand dollars, and has since increased to the value of forty thousand dollars; that the defendant Peter C. Gayetty falsely represented to the plaintiff that he had great influence with men of capital, and was able to interest them in the development, improvement, and working of the mine, and proposed and agreed that he would build, or cause to be built, on said property certain quartz-mills and hoisting machinery, and run cuts and tunnels, and make other improvements thereon within about one month, either by himself or by said men of capital, of the value of ten thousand dollars, said work to be prosecuted diligently, and plaintiff to have possession of the property and superintend the work, provided plaintiff would convey to said Gayetty, or some one to be named by him, the one half of said land and mining claim, plaintiff to retain the ownership of the other one half thereof, with a like interest in said improvements; that plaintiff was induced by said false and fraudulent representations to, and did, convey to the defendant James M. Gayetty, in trust for said Peter C. Gayetty, the one half of said property; that the consideration of \$150, named in said deed, was not the true consideration, and no part thereof was ever paid, and all cost of executing the deed was paid by plaintiff; that James M. Gayetty was the son of Peter C. Gayetty, and took said conveyance with a full knowledge of all the facts; that thereafter plaintiff was induced by the urgent solicitations of said Peter C. Gayetty, and to enable him to carry out his said promises, to join with the said James M. Gayetty in executing to the defendants and the plaintiff a deed for certain portions of said mining claim (describing it); that the consideration of said last-named deed was said prom-

ises and agreements, and the further consideration, as expressed in said deed, of one half or one hundred thousand shares of the capital stock of a corporation thereafter to be formed; that the same was executed on the promises of said Gayetty that said persons would go on and form a corporation for mining purposes and issue such stock and work and develop said mine and erect said mill and hoisting-works and make said improvements thereon as agreed; and plaintiff, believing said representations and promises, made said conveyance, thereby vesting the legal title to said property in the defendants; that the plaintiff, from his ignorance, and the entire faith, confidence, and trust he had in said Peter C. Gayetty, and believing said representations and promises made by him, executed said deed first named, and without any consideration other than the false and fraudulent promises and representations aforesaid, and also having like faith and confidence in his and the other defendants' representations, he joined in the execution of the last-named deed, and for the whole of said property he has not received one cent of money, nor one share of stock, nor any other consideration whatever.

The complaint avers that none of said representations, promises, or agreements have been complied with; that they were falsely and fraudulently made to secure the execution of said deeds and to deceive and defraud the plaintiff, and were known to be so made by all of the defendants; that said Peter C. Gayetty neither had nor exercised any influence with any man of capital, and never intended to pay one cent or perform any of his said promises or agreements, or either of them; that said corporation was never formed, nor any stock issued nor money expended on any of said proposed improvements; that plaintiff, after waiting six months, and nothing being done, or attempted to be done, by the defendants, or either of them, enlisted other means, and has greatly improved said property, working and developing the same by opening shafts, running tunnels, building mills and hoisting-works, and making other improvements, thereby enhancing the value of the property to more than twenty thousand dollars.

It is also alleged that, "by reason of said falsehoods and deceits of the defendants aforesaid, the consideration of said deeds has wholly failed."

The prayer of the complaint is, that the court "order, adjudge, and decree that the defendants, and each of them,

reconvey to this plaintiff whatever of the estate in said property is in him vested, and that the legal title of all of the said defendants be restored and reinvested in the plaintiff," and for general relief.

There was a demurrer to the complaint by the defendant James M. Gayetty, on the ground of ambiguity, in that it did not show the number of shares of stock of the corporation mentioned therein, or the number of shares the plaintiff was to have as part consideration for said deed, and on the further ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled.

The defendants answered, denying the material allegations of the complaint.

There was a trial by the court, and findings in substance:—

1. That plaintiff was the owner of the property.
2. That on the seventh day of October, 1884, the same was of the value of ten thousand dollars, and at the time of filing the complaint, of the value of twenty thousand dollars.
3. That plaintiff was poor, and unable to develop the mine, and the making of the representations and promises by Peter C. Gayetty for himself and as agent for the other defendants substantially as alleged in the complaint, including the promise to form said corporation and issue to plaintiff fifty thousand shares of the stock thereof.
4. "That thereafter, on said seventh day of October, 1884, the plaintiff, in consideration of the full performance of the promises and agreements of the defendants, and relying upon their said representation, as set out in findings 4 and 5, and for no other consideration, executed and delivered the deeds mentioned in the complaint, and also signed the said articles of incorporation, to assist the defendants in carrying out their said promises and agreements."
5. The recording of the deed and the filing of the articles of incorporation of the proposed corporation in the office of the county clerk and of the secretary of state, and the issuance of the necessary certificate of incorporation.
6. That the defendants have not performed any of the promises found to have been made, and have failed, neglected, and refused to keep or perform the same.
7. The plaintiff kept and performed all of the covenants on his part.
8. "That there has been no false representations, nor fraud, in fact, but there has been a complete failure of consideration

for the said deeds or conveyances, and for said contract with the defendants, and without the fault of the plaintiff."

The conclusion of law was, that "plaintiff is entitled to a decree extinguishing his contract with the defendants, and nullifying and setting aside and canceling the said deeds to the defendants and all of them," and judgment was entered in favor of plaintiff accordingly, from which judgment the defendants appeal.

1. The appellants contend that the complaint was insufficient, and that the court erred in overruling the demurrer thereto.

It will be seen that there are two causes of action, or rather two grounds, alleged in the complaint for setting aside the deeds, viz., fraudulent representations and failure of consideration; but these causes grow out of precisely the same state of facts. The representations alleged to have been made are not as to existing facts, but consist in mere promises to perform certain acts in the future. Independent of code provisions, the rule is, that representations to constitute sufficient ground for the relief sought in this action must be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future: *Pomeroy's Eq. Jur.*, secs. 877, 888; *Neidefer v. Chastain*, 71 Ind. 363; 86 Am. Rep. 198; *Welshbillig v. Deinhart*, 65 Ind. 94, 98.

Strictly speaking, a mere promise is not a representation, and the failure to make it good is a breach of contract which gives a cause of action, but not the one pursued here.

But the making of a promise with no intention at the time of performing it constitutes a fraud, for which a contract may be rescinded: *Civ. Code*, sec. 1572; see also *Bigelow on Fraud*, 483 et seq.

The mere failure to perform the covenant does not relate back to and render the same fraudulent. It is the present intent not to perform it that renders it wrongful. The complaint alleges facts sufficient to bring it within the statutory provision as to what shall constitute actual fraud. It sets out fully the promises made, and that, at the time they were made, the defendants had no intention of performing them.

It is true, as counsel for appellants contend, that it is not sufficient to characterize a transaction as fraudulent, and that the facts constituting the fraud must be stated: *Kinder v. Macy*,

7 Cal. 206; *Meeker v. Harris*, 19 Id. 278; 79 Am. Dec. 215; *Capuro v. Builders' Ins. Co.*, 39 Cal. 123.

But the facts are pleaded here. The material facts necessary to show actionable fraud are: 1. The making of the promises; 2. That the plaintiff relied upon and had a right to rely upon them; 3. That he was induced thereby to, and did, make the conveyances; 4. That the defendants have not performed the acts promised, and had no intention of doing so, at the time of making them,

The complaint states facts sufficient to entitle the plaintiff to have the deeds set aside and the property restored to him, on the ground of fraud, and the demurrer thereto was properly overruled.

2. The appellant further maintains that the judgment is not supported by the findings, and that, under the facts as found, the judgment should have been for the defendants.

It will be noticed that upon the question of fraud the findings are in favor of the defendants. The finding is, that "there were no false representations nor fraud in fact."

This effectually disposes of that branch of the complaint, and leaves the plaintiff to depend for a recovery upon a failure of consideration. This brings us to a consideration of the question whether the facts alleged in the complaint, and found by the court, show such a failure of consideration as will authorize the setting aside of a deed conveying real estate.

It seems to us that, shorn of the question of fraud, the complaint and findings present the plain, simple question whether a conveyance of real estate, fully executed on the part of the grantor, can be set aside for a failure of consideration, on the sole ground that the promises and agreements which induced its execution, and which by the terms of the contract under which the deed is made were not to be performed until after its execution, have not been performed. The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance. Counsel for respondent say that the reasonable inference from the continued failure and refusal to comply with their promises is, that the defendants did not intend to comply with them at the time they were made, but this is an argument in the face of the direct finding of the court that there was no fraud. This is a finding against the contention

that they had no intention of performing their part of the contract, as the making of the promises and the failure to perform are clearly found. We are compelled to treat the case as one where the promise was made in good faith, but has not been performed.

Mr. Waterman in his work on specific performance, section 189, says: "With regard to the failure of the consideration as a defense, it is scarcely necessary to say that by this is not meant the non-payment of the purchase-money according to the agreement, the liability to pay, though default be made, being a consideration, but the failure of the contract by the occurrence of something which either determines the existence of the subject-matter or materially affects it. If the subject-matter be not essentially affected, though there may be a claim for compensation, the party injured will not be entitled to be discharged from the contract. Events which, happening before the conclusion of a contract, avoid it, either by determining the existence of the subject-matter or materially affecting it, do not, properly speaking, terminate the contract, but prevent the contract from arising."

It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants; therefore his promise was not dependent upon theirs; nor was there anything appearing in the deed, or in the contract under which it was made, showing or tending to show that a compliance with their promises was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them. The case is precisely the same in principle as if the plaintiff had conveyed and taken a note for the purchase-money, and the defendants had failed to pay the same. The fact that the promise is to expend money in making certain improvements, instead of a promise to pay money to the plaintiff, can make no difference as to the right to rescind on the ground that the grantees have failed to perform the covenants on their part. Certainly it would not be seriously contended that the mere failure by the vendee to pay the purchase-money could entitle the vendor to rescind the contract and recover back the land; and yet that is the ground upon which the plaintiff in this action must recover under these findings, if at all.

Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment, the section referred to has no application to a case like this, where the vendor has waived actual

performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed. If the mere promise and the failure to perform is not sufficient to set aside a deed on the ground of fraud, as we have shown, the fact that the same acts are characterized in the pleading as a failure of consideration cannot give them additional force, and thereby bring about the same result. The case of *Hartman v. Reed*, 50 Cal. 485, is in point against the respondent. There the conveyance was of an undivided interest in an unconfirmed Mexican grant, and the consideration was the agreement of the vendee to prosecute to a final determination, before the board of land commissioners and the courts of the United States, the claim of the vendor to the said rancho, which agreement was not performed. It was said in that case: "The title to the undivided third of the rancho vested absolutely in Crosby, and his agreement did not constitute a condition upon a breach of which the title would revert in Olvera, but a breach of the agreement only gave Olvera a cause of action for damages."

Leaving out of sight the question of fraud, which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of those cases; but to hold that a vendee of real estate could, for a failure to pay the purchase-money, repudiate his deed and recover the land, would render real estate titles dangerously uncertain, and result in the most serious consequences. The judgment is not sustained by the findings.

The complaint in this case and the prayer for relief were such as to entitle the plaintiff to a judgment for damages, and as his right to such recovery was not passed upon, the judgment and order appealed from are reversed, with instructions to the court below to grant a new trial, and allow the parties to amend their pleadings if they so desire.

FALSE REPRESENTATIONS. — For false representations which will avoid a contract, see note to *Williams v. McFadden*, 11 Am. St. Rep. 350, and the cases therein collected; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note 45; *Chatham F. Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727, and note 730. with cases therein collected; *Adams v. Schiffer*, 11 Col. 15; 7

Am. St. Rep. 202, and note; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; *McLain v. Bullmer*, 49 Ark. 218; 4 Am. St. Rep. 36, and note 41. To entitle one to rescind a contract, it is not necessary that he should first have positive knowledge of the falsity of the representations: *Peterson v. Chicago etc. Ry Co.*, 38 Minn. 511. A false representation to authorize a rescission must have actually deceived the plaintiff, for it is not sufficient that defendant merely intended to deceive him: *Bennett v. Gibbons*, 55 Conn. 450. False representations, not made with intent to defraud, when plaintiff fails to avail himself of the sources of information readily within his reach, will not vitiate a contract: *Anderson v. Rainey*, 100 N. C. 321. False representations of any material fact by the seller, which were calculated to induce and did actually induce the buyer to purchase, are sufficient to support an action for the recovery of the purchase-money; nor is it necessary that such representations should have been the sole inducement: *Libby v. Atkins*, 26 S. C. 275. But representations by a seller, known to be acting as such by the purchaser, that a bond secured by a mortgage of a railroad was good, and that the security was good, though such representations were false, and made in bad faith, do not vitiate a contract: *Deming v. Darling*, 148 Mass. 504. A false representation, however innocently made, if injury is thereby occasioned, will give the injured person a cause of action for damages: *Watson v. Baker*, 71 Tex. 739.

[IN BANK.]

SIMPSON v. McCARTY.

[78 CALIFORNIA, 175.]

AFFIDAVIT FOR ATTACHMENT NEED NOT STATE WHETHER AFFIANT'S AVERMENTS ARE BASED UPON DIRECT KNOWLEDGE, or upon information and belief. If the facts are stated positively without qualification, it will be implied that they were within the knowledge of affiant.

ONE MAKING AFFIDAVIT FOR AN ATTACHMENT IN BEHALF OF A CREDITOR NEED NOT SHOW THAT HE IS AN AGENT of the creditor for the collection of the debt, or by express averment, that he makes it in plaintiff's behalf, nor that the facts are peculiarly within his knowledge, nor that there is any particular reason or excuse for the omission of the plaintiff to make the affidavit himself.

AN AFFIDAVIT FOR AN ATTACHMENT STATING THAT THE DEFENDANT IS INDEBTED TO THE PLAINTIFF in a specific sum of money, over and above all legal set-offs and counterclaims, "upon an account stated, a contract for the direct payment of money," etc., is sufficient. It sufficiently appears from such affidavit that the defendant is indebted to the plaintiff upon a contract express or implied.

APPLICATION having been made for the dissolution of an attachment upon the grounds stated in the opinion of the court, and such application having been denied, the defendant thereupon appealed.

Carter and Smith, and James Budd, for the appellant.

C. H. Clement, for the respondents.

BEATTY, C. J. This is an appeal from an order overruling a motion to dissolve, vacate, and set aside a writ of attachment. The grounds of the motion were: 1. That the affidavit did not conform to section 538 of the Code of Civil Procedure, in that it did not state whether the debt was upon an implied or an express contract; 2. That it did not appear whether the affidavit was made upon knowledge, or upon information and belief; 3. That it did not appear that the affidavit was made by or on behalf of the plaintiffs; 4. That the attachment was improperly issued, because the affidavit neither stated whether the contract sued on was express or implied, nor stated facts from which it could be ascertained whether the contract was express or implied; 5. That it did not appear whether the undertaking was made and entered into before or after suit brought; 6. That the undertaking was in the alternative.

The portion of the affidavit called in question was in the following language: —

“ [Title of court and cause.]

“ State of California, county of San Joaquin, ss.

“ J. M. White, being duly sworn, says that he is the agent and salesman of the plaintiffs in the above action; that the defendant in the said action is indebted to them in the sum of \$1,295.75, gold coin of the United States, over and above all legal set-offs and counterclaims, upon an account stated, a contract for the direct payment of money,” etc.

That portion of the undertaking to which objection is made reads thus: —

“ [Title of court and cause.]

“ Whereas, the above-named plaintiffs have commenced, or are about to commence, an action,” etc., dated this seventh day of February, 1888.

The objections to the undertaking have not been urged here.

As to the affidavit, we think there is no force in the second or third of the objections specified as grounds of the motion.

The statute does not require the affiant to state whether his averments are based upon direct knowledge, or upon information and belief, and when, as here, the facts are stated positively without qualification, it will be implied that they were within the knowledge of the affiant.

Neither is it required that the person who makes affidavit in behalf of the creditor should show that he is the agent of the creditor for the collection of the debt, or by express averment that he makes it in his behalf, or that the facts are peculiarly

within his knowledge, or that there is any particular reason or excuse for the omission of the creditor to make the affidavit himself, and there is nothing in the policy of the law requiring the interpolation of such provisions by construction.

The serious question involved in the appeal arises upon the first and fourth objections.

It was held by this court in an early case (*Hawley v. Delmas*, 4 Cal. 196) that an affidavit alleging, in the bald language of the statute, that the indebtedness arose upon an express or implied contract was insufficient to sustain an attachment, and in several subsequent and some recent cases that decision has been cited with approval. Doubtless it states the law correctly, and unless this case can be distinguished, the order appealed from must be reversed.

It seems to us, however, that the cases are distinguishable. The real vice of the affidavit in *Hawley v. Delmas*, *supra*, as pointed out in the opinion of Myrick, J., in *Wilke v. Cohn*, 54 Cal. 213, was, that it stated nothing with certainty; it did not allege an express contract; it did not allege an implied contract; and consequently did not establish the essential fact that any sum of money was due from defendant to plaintiff upon a contract for the direct payment of money. Obviously, this is the one essential fact, for, as regards the right to attach, it makes not a particle of difference whether the contract is express or implied, and all that was decided in the cases referred to was, that so loose an allegation in the alternative could not be treated as an allegation of either alternative. Here, however, is no allegation that if one thing is not true, then another is; it is positively and directly charged that the defendant is indebted to plaintiff "upon an account stated, a contract for the direct payment of money." It may be true, as contended by counsel for appellant, that an account stated can be either an express or implied contract; but on the other hand, it is undeniable that in either case it is a contract for the direct payment of money. The allegation that there is an account stated makes it certain that at least the elements of the implied contract exist, and the mere fact that there is nothing to negative the existence of the additional element necessary to constitute it an express contract does not, in our opinion, deprive the allegation of the requisite degree of certainty.

For these reasons, I think the order appealed from should be affirmed, and it is so ordered.

WORKS, J. (concurring). It is held in *Hawley v. Delmas*, 4 Cal. 196, and cases following it, that an affidavit alleging, in the language of the statute, that the indebtedness is "upon a contract express or implied" is insufficient, because, being in the alternative, it fails to show that it is upon either an express or an implied contract. An account stated may be "a contract express or implied." Therefore an affidavit alleging that it is an account stated is identical with the one held to be bad, because it in effect avers that the indebtedness is upon either an express or an implied contract, and is directly within the cases referred to. But in my judgment, the affidavit in *Hawley v. Delmas*, *supra*, was sufficient under the statute. It is totally immaterial whether the contract is express or implied, as the right of the attaching creditor is precisely the same in either case. The fact of the indebtedness upon contract is the material thing to be alleged; therefore, to say that the defendant was indebted upon contract, express or implied, should, in my judgment, have been held sufficient.

In the case of *Klenk v. Schwalm*, 19 Wis. 111, such an affidavit was held to be sufficient under a statute precisely like our own. For the reason that I do not concur in the rule laid down in the earlier cases referred to, I am of opinion that the affidavit here is sufficient, but if those cases are to be adhered to, I am unable to see how we can do otherwise than to hold the affidavit to be insufficient.

McFARLAND, J. (dissenting). I dissent, and agree with the following opinion written by Commissioner Hayne:—

HAYNE, C. I think *Hawley v. Delmas*, 4 Cal. 196, is in point; and that under that decision the affidavit must show whether the contract is express or implied. If the only thing necessary to be shown was that there was a contract, the alternative words in the affidavit could have been, and presumably would have been, rejected as surplusage. The statement that the indebtedness was on an account stated does not show whether the contract was express or implied, because an account stated may be an implied contract: *Hendy v. March*, 75 Cal. 566. Unless *Hawley v. Delmas*, *supra*, is to be overlooked, I think the order appealed from should be reversed.

Rehearing denied.

AFFIDAVIT FOR ATTACHMENT—INFORMATION AND BELIEF. — An affidavit resting on information and belief of the attaching creditor or his agent is in-

sufficient: *Dyer v. Flint*, 21 Ill. 80; 74 Am. Dec. 73; *Miller v. Munson*, 34 Wis. 579; 17 Am. Rep. 461; note to *Fridenberg v. Pierson*, 79 Am. Dec. 164-174.

AFFIDAVIT FOR ATTACHMENT MADE BY AGENT. — As to what must be alleged and what need not be alleged in an affidavit for attachment made by an agent, see note to *Fridenberg v. Pierson*, 79 Am. Dec. 167; Drake on Attachments, secs. 94, 106; Wade on Attachments, sec. 58. If an affidavit for an attachment is made by plaintiff's attorney, without stating that the applicant is absent, it is merely irregular, not void: *Westcott v. Sharp*, 50 N. J. L. 392; so an agent making such affidavit may state the facts therein to be upon information furnished him by his principal: *Carpenter v. Bodkin*, 26 Minn. 183; compare *Reed v. Bagley*, 24 Neb. 332.

BEST v. JOHNSON.

[73 CALIFORNIA, 217.]

BOND OF AN ASSIGNEE IN INSOLVENCY IS FOR THE BENEFIT OF THE CREDITORS OF THE INSOLVENT ONLY, and if, purporting to act as such, an assignee takes property from third persons, and converts it to his own use, they cannot recover therefor upon such bond.

Geil and Morehouse, for the appellants.

Dorn and Parker, for the respondents.

BELCHER, C. C. This is an action against the principal and sureties on a bond made to insure the faithful performance by the principal of the duties devolving upon him as assignee of the estate of an insolvent debtor. The complaint alleges the appointment of the defendant Johnson, as assignee of the estate, the execution, approval, and filing of the bond, the plaintiff's ownership of certain described personal property, and that Johnson, while acting as such assignee, wrongfully and unlawfully, and against the will of plaintiffs, took the property from them, and converted it to the use and benefit of the estate, and afterward, on demand many times made, refused to deliver to them the possession thereof. The prayer is for a judgment for the value of the property, with damages and costs.

A general demurrer was interposed to the complaint, and sustained as to the sureties Dorn and Hoffman, with leave to plaintiffs to amend. Plaintiffs declined to amend, and thereupon judgment was entered that they take nothing as against the sureties.

The statute requires the assignee of an insolvent's estate to give a bond, with sureties, conditioned for the faithful performance of the duties devolving upon him, and it provides

that "the bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is exhausted": Insolvent Act of 1880, sec. 15. The duties of an assignee, as declared by the act, are to take into his possession all the estate of the insolvent debtor, except property exempt by law from execution, if need be, to sue in his own name, and recover all the estate, debts, and things in action belonging or due to such debtor, to sell the property, and convert the same into money, as speedily as possible, on the order of the court, and to keep correct accounts of all moneys received by him, and to pay them out on the order of the court: Secs. 18, 21, 25, 29, 34.

It is argued for appellants that Johnson, as assignee, had a right to take into his possession only such property as belonged to the insolvent; that he had no right to take the plaintiffs' property, and that when he did so, and converted it to the use of the estate, he violated the conditions of his bond, and he and his sureties became liable thereon. And in support of this theory, counsel cite numerous cases, and among others *People v. Schuyler*, 4 N. Y. 173; *Van Pelt v. Litterer*, 14 Cal. 194; *Lammon v. Feusier*, 111 U. S. 17.

All the cases cited are to the effect that if a sheriff or constable, having in his hands for service a writ of attachment or execution, seizes thereunder the property of a stranger to the writ, he becomes a trespasser, and is guilty of such official misconduct as makes him and his sureties liable on his official bond.

In *People v. Schuyler*, *supra*, the court, after stating that the defendant was a sheriff, and that the writ was delivered to and received by him as a public officer, said: "His sureties undertook 'that he should faithfully execute' the process. If he had, 'in all things,' performed his duty, he would have seized the goods of Fay, or returned the writ, instead of which he levied upon the goods of Bachellor, as the property of the defendant in the attachment. Upon principle, and upon grounds of public policy, it seems to me that the responsibility of his sureties should be different from those they would incur if the sheriff had entered upon the premises of the relator, and removed his goods without any process whatever. In the last case supposed, the sheriff would act in his own right, and might be resisted as any other wrong-doer. In the one before us, he was put in motion by legal authority,

invoked in behalf of others, and could command the power of the county to aid him in its execution." And in *Van Pelt v. Littler, supra*, the court said: "The weight of authority, and, as we think, a fair construction of the statute, and the condition of the bond, are in favor of the maintenance of the action. The legislature intended that the officer and his sureties should be responsible for every abuse of his official powers; and we think there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. He does not act in such a case in a private and individual capacity, but as an officer, clothed with official authority, and protected by the judgment of a court and the process which he pretends to execute. No resistance can lawfully be made by any person whose property is thus taken. The property itself may be detained, whether legally taken or not, and a summary mode is provided, for the protection of the officer, to determine disputes in regard to the title. To hold that such an act is not official, at least so far as to charge the sureties, it appears to us would be in contravention of the spirit and intention of the statute."

There is a broad and obvious distinction between the cases cited and the case in hand. In those cases, the officer, when he took the property, claimed to be executing process issued from a competent court, and was apparently acting under lawful authority. No one could rightfully have interfered with or resisted his seizure of the property; and, if needed, he could have called to his assistance the *posse comitatus*.

Not so with the assignee. He had no writ or process to serve. He was not put in motion by legal authority, but was acting at his own instance, and upon his own authority. He could not have invoked the aid of a *posse* to assist him, but might have been resisted like any other wrong-doer.

The duties of the assignee of an insolvent's estate are wholly private. He is to take charge of and manage the estate for the benefit of the creditors, and they are the only persons named in the act who can sue on the bond: Sec. 15. The creditors and debtor are alone interested in the amount and sufficiency of the bond: *Luhre v. Kelly*, 67 Cal. 291. It follows that the liability of the sureties on the assignee's bond is different from the liability of the sureties on a sheriff's bond.

But if it be assumed that this is not so, and that the same rule is to be applied in each case, there would, nevertheless.

be no liability upon the sureties here. For it is clear that the liability of the assignee's sureties can be no greater than the liability of a sheriff's sureties. And the rule is, that a sheriff's sureties are not liable for the wrongful seizure or detention of property or money when not made by him under process: *State v. Mann*, 21 Wis. 684; *Turner v. Collier*, 4 Heisk. 89; *Governor v. Perrin*, 23 Ala. 807; *Schloss v. White*, 16 Cal. 66; and see *Commonwealth v. Cole*, 7 B. Mon. 250; 46 Am. Dec. 506, and note.

It results, therefore, that the demurrer was properly sustained, and that the judgment should be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

BONDS, OFFICIAL, AND BREACHES THEREOF: See monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 509-517.

LIABILITY OF SURETIES ON SUCCESSIVE BONDS OF THE SAME OFFICIAL: See note to *Oruen v. Commonwealth*, 10 Am. St. Rep. 843-860.

[IN BANK.]

GALE v. BEST.

[78 CALIFORNIA, 285.]

IF A PATENT IS TO BE ISSUED TO PUBLIC LANDS UPON THE ASCERTAINMENT OF CERTAIN FACTS by the proper officers of the land department of the general government having jurisdiction to inquire into and to determine those facts, then the issuance of a patent is a final declaration that such facts have been found in favor of the patentee, and is conclusive in a court of law, and cannot be collaterally attacked.

PATENT WHEN CONCLUSIVE THAT LAND IS NOT MINERAL. — Where a patent issues for public lands under a law which provides for their disposal as agricultural lands, — either to a railroad corporation or to pre-emption or homestead claimants, — and there is no reservation in the law, except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural, and afterwards, in a court of law, it is not competent to reopen the question of the character of the land.

Gray and Sexton, and W. S. Riley, for the appellants.

Hundley and Gale, for the respondent.

McFARLAND, J. This is an action to recover possession of certain land, and to restrain defendants from doing certain acts thereon in the nature of waste. Judgment went for plain-

tiff, and defendants appeal from the judgment, and from an order denying a motion for a new trial.

The land in contest is within the limits of the grant of lands by Congress to the California and Oregon Railroad Company, a corporation; and on March 17, 1875, the government of the United States executed and delivered its patent, in due form of law, to the Central Pacific Railroad Company, a corporation, successor to said first-named corporation, by which it conveyed said land to said last-named corporation without any reservation whatever. Plaintiff holds, and was in possession, under said Central Pacific Railroad Company. In December, 1885, and while plaintiff was in possession of said land, defendants entered thereon, and did the usual acts which constitute the location of a mining claim upon the public domain; and in December, 1886, they took possession of said land and dispossessed plaintiff; and since then, until restrained by order of court, were engaged in digging, excavating, and removing large quantities of the soil, etc., from said land. They claim a right to the possession of the land upon the ground that it is mineral land, and that all mineral land was reserved in the grant by Congress to said railroad company. That part of their answer which sets up this defense was, on plaintiff's motion, stricken out; and at the trial an objection to their offer to prove that the land was mineral was sustained. Upon these two rulings of the court below, the main point in the case arises.

The rule is well settled by numerous decisions of the supreme court of the United States that when a law of Congress provides for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee; and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally. Of course, if the patent be void upon its face, or if looking beyond the patent for a law upon which it is based it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent would be worthless, and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly

and unconditionally reserved by Congress from disposal under any statute, a patent for any part of such tract would be void. But if a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character,—such as swamp or mineral,—then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government.

There are many decisions of the supreme court of the United States establishing these views; and it is sufficient to refer to the cases of *Smelting Company v. Kemp*, 104 U. S. 636, and *Steel v. Smelting Company*, 106 Id. 447, where Mr. Justice Field, in elaborate opinions, discusses the whole subject, and cites the other cases bearing upon the question. It may, however, be well, perhaps, to allude briefly to the case of *French v. Fyan*, 93 Id. 169, because that case seems, in principle, to be exactly like the one at bar. In that case a patent had been issued to the state of Missouri for certain swamp and overflowed land, under a certain act of Congress. A party claiming the land under a grant to a railroad company, which would have carried the title if the land were not swamp, brought an action of ejectment, and sought to introduce parol evidence to prove that as a matter of fact the land was not of that character, and thus impeach the validity of the patent. There, as in the case at bar, the question was as to the character of the land. The court below rejected the offered evidence, and held that the patent concluded the question. The supreme court sustained the ruling of the court below, and Mr. Justice Miller, in delivering its opinion, said: "We are of opinion that in this action of law it would be a departure from sound principle, and contrary to well-considered judgments in this court and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In *Steel v. Smelting Co.*, *supra*, Justice Field, whose exhaustive opinion we cannot here undertake to reproduce, among other things, says as follows: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And again, speaking of the lands held by the possessor of a patent, he says: "If intruders upon them could compel him in every suit for possession to establish the validity of the action of the land department, and the correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to another conclusion. So his rights in different suits upon the same patent would be determined, not by its efficiency as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence": 104 U. S. 636, 641. And the pith of the whole matter is aptly expressed by the same learned justice in *Smelting Co. v. Kemp*, 104 Id. 636, where, speaking of the land department, he says: "Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed": 104 Id. 646.

It is contended by appellants that former decisions of this court, in *McLaughlin v. Powell*, 50 Cal. 64, *Carr v. Quigley*, 57 Id. 394, and *Chicago Q. M. Co. v. Oliver*, 75 Id. 194, are in conflict with the doctrine above stated. Whether or not there be any expressions in the opinion in either of those cases inconsistent with the views of the highest federal court on the subject (which views, in the end, on a question like this must prevail), it is not necessary here to consider. In order to affirm the judgment in the case at bar, there is no necessity to upset either of those cases. In *McLaughlin v. Powell*, *supra*, the patent itself expressly excepted "all mineral lands, should any be found to exist in the tracts," embraced by the patent. And the decision is expressly put upon the ground that there was that exception, and that it was "part of the description" of the lands conveyed. And it may be strongly argued that in such case, although it was the duty of the land department to determine the character of the land before the issuance of the patent, yet, as the patent shows upon its face that such duty was not performed, the patentee must be held to have taken it knowing its uncertain and unsubstantial character. On the other hand, Judge Sawyer has held, in an opinion of great force and ability, that the issuance of a patent in such a case was a conclusive declaration that the land was of the character to be properly patented under the law,—that is, agricultural land; that there is no authority to make in such a patent a general reservation of mineral lands, any more than there is in case of a pre-emption patent; and that such a reservation is void: *Cowell v. Lammers*, 10 Saw. 246. At all events, as in the case at bar the patent contains no reservation whatever, the case of *McLaughlin v. Powell*, *supra*, is not authority here. And the same may be said of *Chicago Q. M. Co. v. Oliver*, *supra*. In that case, the patent also excepted "all mineral lands, should any be found to exist," etc. *Carr v. Quigley*, *supra*, is not in point at all. In that case, there was no question about the character of the land patented. It was claimed to be within a "government reservation," and that the body of land itself involved in that case, without reference to its character, was expressly reserved from the operation of the law under which the attempt was made to patent it.

Our opinion is, that where a patent issues for public land under a law which provides for its disposal as agricultural land,—either to a railroad company or to pre-emption or homestead claimants,—and there is no reservation in the

law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterward, in an action in a court of law, it is not competent to reopen the question of the character of the land. The opposite view would render the titles to a large region of California now rapidly filling up with agricultural settlers unstable, insecure, and almost worthless. It would affect, also, those holding through patents under the pre-emption and homestead laws,—for mineral lands are exempted from the provisions of those laws. The theory of that view is, that if the land previously patented as agricultural can at any time be shown to be, in fact, mineral, then the title to it never passed from the United States, but it had always remained a part of the public domain; and as no statute of limitations runs against the government, the insecurity of the title under the patent would be perpetual, and an attack upon it could be made as successfully one hundred years hence as now. Such, in our opinion, is not the law.

The view taken of the question presented by the court below was correct; and we see no error in the record.

Judgment and order affirmed.

PATENT. — A patent cannot be attacked collaterally, unless it is absolutely void upon its face, or is issued for lands over which the land department had no jurisdiction: *Jackson v. Hart*, 12 Johns. 77; 7 Am. Dec. 280; *Overton v. Campbell*, 5 Hayw. 165; 9 Am. Dec. 780; *Jackson v. Lawton*, 10 Johns. 23; 6 Am. Dec. 311; *Norvell v. Camm*, 6 Munf. 233; 8 Am. Dec. 742; *Lassly v. Fontaine*, 4 Hen. & M. 146; 4 Am. Dec. 510; *Alexander v. Greenup*, 1 Munf. 134; 4 Am. Dec. 541; *Witherington v. McDonald*, 1 Hen. & M. 306; 3 Am. Dec. 603; *Sykes v. McRory*, 10 Ga. 465; 54 Am. Dec. 402; *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Leviston v. Ryan*, 75 Cal. 293; *Southern Pacific R. R. Co. v. Purcell*, 77 Id. 69; compare note to *Terry v. Meyerle*, 85 Am. Dec. 93, 94, as to impeachment of a patent for public lands; *Chever v. Horner*, 11 Col. 68; 7 Am. St. Rep. 217, and note 226. And compare *Chicago etc. Co. v. Oliver*, 75 Cal. 194; 7 Am. St. Rep. 143, and note 146, which case is distinguished from the principal case.

[IN BANK.]

WEYANT v. MURPHY.

[78 CALIFORNIA, 278.]

EQUITY WILL NOT ASSIST ONE PERSON TO PROFIT BY THE MISTAKE OF ANOTHER. Hence, where a party by mistake bid for land at a foreclosure sale a less sum than was due thereon, and he, on discovering such mistake, increased his bid to the full amount due, which amount he paid, it was held that a court of equity would not compel such purchaser to accept a redemption based on the original sum, which he had thus mistakenly bid, but would grant relief only on the condition that the complainant pay the whole sum which was legally chargeable on his land.

Freeman, Bates, and Rankin, Grove L. Johnson, and Beatty, Denson, and Oatman, for the appellants.

McKune and George, and Clinton L. White, for the respondents.

PATERSON, J. The material facts of this case are as follows: One Segur, who was the owner of two tracts of land, which may be designated respectively as the El Dorado tract and the Sacramento tract, mortgaged them both to Mrs. Alice Scott, to secure the payment of sixteen thousand dollars. Subsequently Segur sold and conveyed the El Dorado tract to certain parties for eight thousand dollars. Of this sum, one thousand dollars only was paid in cash. The grantees agreed to pay the remaining seven thousand dollars to Mrs. Scott on account of the principal of said mortgage, which agreement was expressed in the conveyance. Subsequently the grantees conveyed the property to other parties upon like terms, viz., the second set of grantees paid the sum of one thousand dollars, and assumed the payment of seven thousand dollars of the principal of the Scott mortgage, and this agreement was expressed in the deed. This second set of grantees conveyed to the plaintiff by a deed which expressed a consideration of one thousand dollars, and contained the following clause: "Subject to all mortgages now existing against said above-described land." Neither the plaintiff nor any of his grantors ever paid the seven thousand dollars above mentioned, or any part thereof.

The Sacramento tract was sold and conveyed by Segur to the defendant, for the sum of eighteen thousand dollars. Of this sum, half was paid down, and the defendant agreed to pay the remaining nine thousand dollars to Mrs. Scott on account of the principal of her mortgage. This agreement was

performed by the defendant. He paid Mrs. Scott the nine thousand dollars, with the accrued interest thereon, leaving due to her the seven thousand dollars, and accrued interest thereon, which had been assumed by the plaintiff's grantors.

In this condition of affairs, Mrs. Scott commenced a suit to foreclose her mortgage for the balance due to her, joining both the parties here as defendants in such suit, and in due course a decree of foreclosure was entered, adjudging that there was due to the plaintiff, in said foreclosure suit, the sum of \$8,756.54, and decreeing that the two tracts be sold to satisfy the same, by a receiver, who had been appointed by the court. But in view of the fact that the defendant here had paid such portion of the common burden as he had agreed to pay, and that the grantors of the plaintiff had not paid the portion which they had agreed to pay, and subject to which the plaintiff took his tract, the court in the foreclosure suit very properly decreed that the El Dorado tract be sold first. This was an adjudication that the burden of the Scott mortgage should rest primarily upon the tract of the plaintiff here.

As a matter of course, it was important to the defendant to see that the full amount of the judgment was bid upon this tract. But by a stupid blunder he did not bid that amount, but only the sum of two thousand five hundred dollars, for which sum the property was struck off to him. Within a few days he was informed of the mistake he had made, and he then applied to the receiver for leave to increase his bid. This the receiver allowed him to do, and reported the sale to the court as for the amount of the increased bid, and the court confirmed the same. The defendant thereupon paid the full amount of the increased bid, viz, the sum of \$8,756.54. We think that the evidence shows without substantial conflict that this sum was paid by the defendant here, and received by the receiver, as and for the purchase price of the El Dorado tract, and not, as found by the court, as "a voluntary payment, not in pursuance of his bid, but to prevent a sale of the balance of said land."

The plaintiff tendered to the defendant the two thousand five hundred dollars, for which the property was struck off at the auction sale, with the necessary percentage, etc., and this being refused, he brings the present action to be allowed to redeem for the sum as tendered. The value of the El Dorado tract is shown to be seven thousand or eight thousand dollars.

It will be observed that the defendant had a perfect right

to bid in the first instance the sum to which he increased his bid, and which he afterward paid for the property. His not doing so was the result of a mistake of law on his part, and we think his subsequent action, and that of the receiver, was in perfect good faith, and not with any fraudulent intent whatever, but simply to rectify the mistake, and to do what he had a perfect right to do in the first instance. If the mistake had not been corrected by the parties, the result would be to relieve the plaintiff's property of the burden which was put upon it primarily by the decree of foreclosure, and to cast the same upon the defendant. The plaintiff appeals to a court of equity to assist him to profit by the defendant's mistake. We think the court should not lend its aid for any such purpose. He is entitled to redeem the property. But as a condition of this relief, the court will require him to assume the burden which was properly placed upon him by the decree of foreclosure; that is to say, as a condition of relief, he would be required to pay to defendant, in addition to the amount placed in bank to the credit of defendant, the difference between the sum which he tendered and deposited, and the amount due under the decree of foreclosure. It is immaterial that the plaintiff is not legally liable to the defendant for this difference. In imposing a condition, a court of equity is not bound down to the strict legal rights of the parties, but will take into consideration all the circumstances in order to arrive at the justice of the case: *Johnston v. San Francisco Savings Union*, 75 Cal. 134.

The judgment and order are reversed, and the cause is remanded for a new trial in accordance with the views herein expressed.

EQUITY WILL NOT PERMIT THE JUST RIGHTS of a party to be lost through mistake or ignorance of fact, when such relief is not prejudicial to the rights of others: *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78.

[IN BANK.]

**SMITH v. LOS ANGELES IMMIGRATION AND LAND CO-
OPERATIVE ASSOCIATION.**

[73 CALIFORNIA, 289.]

A MAJORITY OF A QUORUM OF A BOARD OF DIRECTORS OF A CORPORATION is essential to the adoption of a resolution; and it is equally essential that such majority be not made up of directors who are disqualified to act by reason of their interest in the resolution.

A DIRECTOR IN A CORPORATION IS DISQUALIFIED TO VOTE UPON A RESOLUTION authorizing the renewal of two notes, one of which is in his favor; and his vote cannot be treated as sufficient to sustain that note in which he had no interest.

FINDINGS. — APPELLATE COURT WILL NOT SUPPLY A FINDING TO SUPPORT a judgment upon a point respecting which evidence was conflicting.

NOTICE OF THE WANT OF AUTHORITY OF AN OFFICER OF A CORPORATION TO EXECUTE A NOTE must be imputed to the assignee of such note when such officer is also the payee therein.

RES JUDICATA. — In an action on a promissory note, the plaintiff is not estopped nor precluded from recovering by a former judgment declaring that a previous confession of judgment on the same note was fraudulent and void, and ordering such judgment to be set aside.

ACTION upon a promissory note which purported to be executed by the defendant, a corporation, by one Garey, its president, and in favor of the latter. The defendant pleaded a former judgment as an estoppel. This judgment was entered in a suit in equity brought by the defendant against plaintiff and his assignor. The findings and judgment thus pleaded merely determined that a previous confession of judgment obtained by the plaintiff from the president and secretary of the corporation defendant was fraudulent and void, and ordered that such judgment be set aside, and that such corporation be allowed to defend the action, and restrained the plaintiff from proceeding in that action unless he consented to allow such judgment to be set aside, and to proceed to a new trial against the corporation.

Smith and Patton, and H. Howard, for the appellant.

Wells, Van Dyke, and Lee, for the respondent.

THE COURT. This is a suit on a promissory note purporting to have been executed by one Garey, president of the corporation defendant, in his own favor, and assigned after maturity to the plaintiff.

Conceding for the purpose of this decision that the sum for which the note was given was honestly due from the corpora-

tion to its president, the note was nevertheless invalid, unless authorized or ratified by the directors.

The judgment of the superior court in favor of plaintiff rests upon a finding that the execution of the note was duly authorized. But the evidence shows that the only authority to execute it was the following resolution: That "all notes held by T. A. Garey, and also by H. J. Crow, be renewed, and two per cent interest per month be allowed."

There were seven directors of the corporation, and only four — a bare quorum, two of whom were Garey and Crow — were present at the meeting at which the above resolution was attempted to be passed.

It was essential to its adoption that a majority of the quorum should vote for it (Civ. Code, sec. 308); and clearly there could not have been such majority unless the vote of Garey or Crow was counted in the affirmative.

Garey testifies that he did not vote at all upon the resolution, and respondent contends that so far as it concerned the renewal of Garey's notes, Crow was competent to act. But we cannot assent to this proposition. He was, we think, disqualified by his direct interest in the passage of that inseparable part of the resolution which authorized the renewal of his own notes.

We feel constrained to hold that the finding of an original authority to execute the note sued on is unsupported by the evidence.

As to the claim that the judgment of the superior court may be upheld on the ground that the corporation subsequently ratified the execution of the note, we can only say that upon this point the evidence is conflicting, and as the superior court has made no finding, we cannot supply one.

The fact that the note appeared upon its face to have been executed by Garey on behalf of the corporation was sufficient to charge his assignee with notice of any want of authority to execute it: *Wilbur v. Lynde*, 49 Cal. 290; 19 Am. Rep. 695.

For these reasons, it will be necessary to remand the cause for a new trial, and as the question will necessarily arise in any future trial as to the effect of the judgment pleaded by defendant as an estoppel, we will add that in our opinion the superior court did not err in holding that the plea of estoppel was not sustained by the judgment and findings offered in evidence.

Judgment and order reversed, and cause remanded.

APPELLATE PRACTICE. — Where written findings are necessary, and do not appear in the record, they will be deemed to have been waived; and if they were not, the error to be available must appear in the bill of exceptions: *Campbell v. Coburn*, 77 Cal. 36; for the court will not go behind the abstract filed by the appellant or plaintiff in error: *Flannery v. Kansas City etc. R. R. Co.*, 97 Mo. 192; nor has the appellate court power to make omitted evidence a part of a bill of exceptions or of the record in a case taken up on appeal: *Saxon v. State*, 116 Ind. 6. Where evidence is conflicting upon a disputed fact, the appellate court will not interfere with the verdict: *Donnelly v. Burrett*, 75 Iowa, 613; *Bruin v. St. Louis etc. R'y Co.*, 96 Mo. 290.

CORPORATIONS. — A director cannot act where his interests are adverse to the interests of the corporation of which he is a director: *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 183; 98 Am. Dec. 95, and note 102. Compare *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64, and note 69; *Gallery v. National Ex. Bank*, 41 Mich. 169; 32 Am. Rep. 149; *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5, and note 12.

CORPORATIONS. — When the acts of a majority of a quorum of the directors are binding: *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 79; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Elliot v. Abbot*, 12 N. H. 549; 37 Am. Dec. 227; *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207; *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743; *Commonwealth v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450; *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. 124; 43 Am. Dec. 465; *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64.

[IN BANK.]

IN RE TYLER.

[78 CALIFORNIA, 807.]

SUSPENSION OF AN ATTORNEY UNTIL THE PAYMENT OF A CERTAIN JUDGMENT AGAINST HIM. — An attorney at law may be suspended for a definite time and until a designated judgment against him shall be fully satisfied, under a statute authorizing the court to deprive him of the right to practice, either permanently or for a limited period.

Sol. Heydenfeldt, for applicant.

Edward R. Taylor, contra.

WORKS, J. Proceedings were instituted in this court to disbar the respondent, which resulted in a judgment depriving him of the right to practice as attorney or counselor in any or all of the courts of this state, and that he be suspended from the practice for the period of two years from the date of the judgment, "and until the judgment in favor of J. M. Hogan against the said respondent, mentioned and described in the accusation, shall be fully satisfied and paid, if the same shall not have been satisfied during such period of two years."

The facts upon which this judgment was rendered will be found in 71 Cal. 353.

The respondent in that proceeding now moves this court to strike out so much of the judgment as suspends him from the practice until the payment of the Hogan judgment, the two years for which he was suspended having expired. The motion is not based upon any new or additional facts, nor is it claimed that the judgment referred to has been paid in whole or in part, or any excuse shown for not having paid the same. The sole ground upon which relief is sought is, that this court had no power or jurisdiction to make an order suspending him for what is claimed to be an indefinite time.

The section of the code upon which the judgment is based is as follows: "Upon conviction, in cases arising under the first subdivision of section 287, the judgment of the court must be, that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and, upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged, —deprivation of the right to practice as attorney or counselor in the courts of this state permanently or for a limited period": Code Civ. Proc., sec. 299. The point made is, that under this section the court could deprive him of the right to practice permanently, or for a limited period; that a limited period means a fixed and determinate period; and that the judgment rendered, being for an uncertain time, depending upon the happening of an uncertain event, was not within the power conferred by the section, and is void.

It is conceded that the court might have disbarred the respondent permanently. The accusation made against him was sufficient to warrant such an extreme punishment. In a petition to this court, during the pendency of the original proceeding, asking that the same be set for hearing, the respondent says: "Your petitioner respectfully represents that nearly three months ago there was filed in said court an accusation in writing, prepared by one E. S. Pillsbury, and signed and sworn to by one J. M. Hogan, charging me with acts that, if true, ought not only to deprive me of the privilege of practicing law in any court, but ought to relegate me to the occupation of a felon's cell." This court, upon a full and careful investigation, found the accusation to be true, and

might consistently have meted out to him the punishment so rashly approved by him in advance. Therefore we see nothing in this case calling for clemency. It resolves itself into a pure question of jurisdiction in this court to render such a judgment. Upon this question we entertain no doubt. The court might have deprived him permanently of the right to practice. It did so, subject to the right of the accused to relieve himself from its effect, by making restitution of the money illegally withheld by him. In some of the states it is expressly provided by statute that where an attorney has refused, on demand, to pay over money collected by him, he may, on motion of the party aggrieved, be required to do so by an order of the court, and, upon failure, may be suspended for any length of time, in the discretion of the court. In others, the right of the courts to proceed in this summary manner, without statutory authority, is recognized and upheld by the decided cases: *Forstman v. Schulting*, 108 N. Y. 110; *In re Paschal*, 10 Wall. 491; *Petition of Fincke*, 6 Daly, 111, 116; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *Kuhne v. Daily*, 23 Hun, 282; *In re Mertian*, 29 Id. 459; *Anonymous*, 2 Cow. 589. See, as sustaining a judgment in effect the same as the one rendered here, *Slemmer v. Wright*, 54 Iowa, 164. See also, as bearing upon the question, *Weeks on Attorneys*, sec. 81, and cases cited.

This court having the power to deprive the respondent permanently of the right to practice in the courts of this state, the punishment inflicted here was within its jurisdiction. It was not void for uncertainty. If, instead of a motion to strike out a part of the judgment, the respondent had made a showing that he had paid the judgment mentioned therein in full, and moved for an order reinstating him as an attorney, the order could have been made, but we see no reason, as the case is presented to us, for modifying the judgment.

Motion denied.

ATTORNEYS. — A license to practice law is not a contract, but a mere naked grant of a privilege which the court may revoke, or upon which it may impose such conditions as are deemed proper and in the interest of the public welfare: *Simmons v. State*, 12 Mo. 268; 49 Am. Dec. 131; and see *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314, and extended note as to the general law respecting the disbarment of attorneys. Compare the recent cases of *In re Stephens*, 77 Cal. 357; *In re Moore*, 72 Id. 359; *Forstman v. Schulting*, 108 N. Y. 110.

[IN BANK.]

BURKETT v. BURKETT.

[78 CALIFORNIA, 310.]

A HUSBAND MAY CONVEY THEIR HOMESTEAD TO HIS WIFE without her joining in the deed. Such conveyance operates to vest her with title in fee and in severalty to the property, but does not otherwise affect its homestead character.

HOMESTEAD. — IF A DIVORCE IS GRANTED TO A WIFE AFTER HER HUSBAND HAS MADE HER A CONVEYANCE OF THEIR HOMESTEAD, and the decree is silent with respect to the disposition to be made of such homestead, her title thereto becomes absolute as against him.

J. C. Campbell and D. S. Terry, for the appellant.

Dunlap and Vischer, and Joseph H. Budd, for the respondent.

WORKS, J. This case presents two questions necessary to be considered:—

1. Can a husband make a valid conveyance to his wife of his separate real estate, upon which he has declared a homestead which is still subsisting at the time of the conveyance?

2. If so, what was the effect upon the title of a divorce granted to the wife subsequent to the conveyance, the property rights of the parties not being adjudicated in such divorce proceeding?

The plaintiff, being the owner of certain real estate as his separate property, declared a homestead thereon, he and the defendant then being husband and wife, and residing on the property. Subsequently he conveyed the property directly to the defendant, who was still his wife. Thereafter the defendant procured a decree of divorce, but there was no adjudication as to the property. The plaintiff prosecutes this action to quiet his title. The court below found for the plaintiff on the ground that the conveyance was void, and judgment was rendered accordingly. The defendant appeals.

1. In this state either husband or wife may enter into any agreement or transaction with the other, respecting property, which either might if unmarried: Civ. Code, sec. 158. Therefore, a husband may convey his real estate directly to his wife, as he may to any other person.

The effect of declaring the homestead was to convert the separate title of the husband into a joint title in himself and wife to the extent of the homestead: Civ. Code, secs. 1237, 1242, 1265; *Barber v. Babel*, 36 Cal. 14. And thereafter the homestead could not be conveyed or encumbered, except by

an instrument executed and acknowledged by both husband and wife: Civ. Code, secs. 1242, 1243; *Barber v. Babel*, 36 Cal. 14; *Flege v. Garvey*, 47 Id. 375; *Gagliardo v. Dumont*, 54 Id. 498; *Graves v. Baker*, 68 Id. 133; *Porter v. Chapman*, 65 Id. 365; *Tipton v. Martin*, 71 Id. 325.

The cases cited construe the statute as enacted in the interest of the wife, where the declaration is by the husband, and hold that no conveyance in derogation of her rights under the homestead can be effective unless she joins in the same. But all of the cases relate to conveyances to third parties, which are necessarily in derogation of her homestead rights. It is true, the case of *Tipton v. Martin*, *supra*, was a conveyance to the wife, but only in trust and for the benefit of the *cestui que trust*. The case before us presents an entirely different question. The conveyance was not in derogation of the homestead rights of the wife. Being a conveyance of the legal title from one of the joint owners of the homestead right to the other, the property must be held to remain a homestead as before. The requirement of the statute that the wife shall join in the conveyance only applies to a conveyance or abandonment of the homestead. As the deed under consideration did not in any way affect the homestead, it is not within the statute, and no reason occurs to us for holding such a conveyance to be void.

In the case of *Gagliardo v. Dumont*, *supra*, it was said: "Under the restraints imposed by the homestead law, neither the husband nor the wife had power to transfer the homestead by a separate conveyance, nor could either encumber it to the prejudice of the other or of both, or to the destruction of the homestead itself. The obligation between them, in respect to its preservation, was reciprocal. Neither could, without the consent and concurrence of the other, alienate or transfer it. It was created as a place of residence for the family, and it is the policy of the law to preserve it intact for that purpose until both the husband and wife shall mutually resolve to destroy it by alienation or abandonment. In pursuance of that policy its destruction is prohibited, except by the joint act of both in the mode provided by the homestead law."

It will be seen from the language of this and other cases that the object of the statute, as construed by this court, is to prevent the destruction of the homestead, except by the consent of the parties, expressed by a joint conveyance. If this deed could be held to have that effect, it might be declared void. But as its effect is to leave the homestead intact, and

vest in the wife the legal title to the property, subject thereto, no right intended to be protected by the constitution and legislation under it is infringed or affected in any way. The question is an open one in this state, but we are not without authority to support such conveyance: *Spoon v. Van Fossen*, 53 Iowa, 494; *Green v. Farrar*, 53 Id. 426; Thompson on Homesteads, sec. 473; Platt on Rights of Married Women, sec. 70, p. 225; *Riehl v. Bingenheimer*, 28 Wis. 86; *Baines v. Baker*, 60 Tex. 140; *Ruohs v. Hooke*, 3 Lea, 302; 31 Am. Rep. 642; *Harsh v. Griffin*, 72 Iowa, 608.

The holding in the cases cited is, in effect, that the conveyance from the husband to the wife of the homestead property does not affect the homestead character of the estate, but carries his title subject thereto. She holds the title for the benefit of the family, subject to the same restriction against alienation applicable to the same in the hands of the husband. It is said in Thompson on Homesteads, section 473: "The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, or to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance." So in *Spoon v. Van Fossen*, 53 Iowa, 494, the court said: "Section 1990 of the code provides: 'A conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument.' It is urged by appellant's counsel that it would be absurd to require the wife to sign a conveyance to herself. This may be admitted, but it does not follow that a deed from the husband to the wife will operate as a surrender of the husband's homestead rights in the property conveyed. It is the policy of the law to preserve to every family a homestead; such a course greatly subserves the interests of society and of good government; hence the law has wisely thrown restrictions about the manner of conveying or encumbering the homestead. If the nature of these restrictions is such that they cannot be observed in the case of a conveyance by the husband to the wife, it follows that the husband cannot convey his homestead rights to the wife, rather than that the conveyance shall prove effectual, not-

withstanding its failure to comply with the conditions of the statute. It does not follow that the deed to the wife is a nullity; it may have operated to vest in the wife the legal title to the property. But the property continued still to be the homestead of the family. The declaration in the deed of the intention to surrender homestead rights, and allow the wife the absolute disposition of the property, is ineffectual, because not expressed in the manner required by the law. After the conveyance the homestead remained, with the title, it may be conceded, in the wife."

In the case of *Riehl v. Bingenheimer*, 28 Wis. 84, the deed was to a third party in trust for the wife, and the court said: "It is contended by counsel for the plaintiff that the conveyance by Paul Bingenheimer to Judge Paine is void, because the premises sought to be conveyed by it were a homestead, and the wife of the grantor did not join in such conveyance. The statute then was, and still is, that a mortgage or other alienation of a homestead by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same. This statute was enacted to protect the wife, and to enable her to protect her family in the possession and enjoyment of a homestead, after one had been acquired by her husband; but evidently it was not intended to interpose obstacles in the way of the conveyance of such homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever might be the form of such conveyance.

"Under the circumstances of this case, we are of the opinion that the conveyance to Judge Paine was not an alienation of the homestead within the meaning and intent of such statute. The express trust which was attempted to be created by that conveyance is clearly a passive one, and the grantee took no title by virtue of the conveyance, but the legal estate vested immediately in the defendant, the plaintiff, and Elizabeth, to the extent of the estate therein granted to them respectively."

It is claimed by the respondent that the homestead laws of other states differ from our own, and for that reason the decisions of the courts of such states cannot be relied upon. But we find that the statutes in the states referred to are the same, in principle, as the code of this state, in respect to the power and manner of alienating the property. However this may be, we should not hesitate to hold such a conveyance to be valid, independent of authority. That such conveyances should be upheld seems to us to be eminently just and en-

tirely consistent with the letter and spirit of the homestead laws. We can see no just reason for permitting the husband to question his own conveyance of the property, and as no one else is complaining, or could be injured thereby, the same must be upheld.

The respondent makes the point that this was a mere gift, and the mode of making it being incomplete, it cannot be enforced. If the gift were not perfectly executed, and this were an attempt to compel a specific performance, the rule invoked would be applicable. But as we have held that the execution of the conveyance was perfect without the signature and acknowledgment of the wife, and the action is by the grantor to avoid the same, the point is not well made.

2. We pass to the question as to the effect of the divorce upon the title. At the time the divorce proceeding was instituted and the decree rendered therein, the property was a homestead upon the separate property of the wife, by virtue of the declaration by the husband, and his subsequent conveyance to her. There was no adjudication as to their rights in the property. In that proceeding the rights of the parties to the property might have been determined, and if the plaintiff had shown any just ground for setting the whole or any part of the same off to him, this might have been done for a limited time under subdivision 4, section 146, of the Civil Code, which provides that "if a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party."

The husband having conveyed the property to the wife, by a valid deed, prior to the commencement of the divorce suit, she must be regarded as the "former owner," under this section, and entitled to the property, subject only to the power of the court to set the same apart to the husband, for a limited time, if he appeared to be the innocent party.

It affirmatively appears from the record before us that the plaintiff was not the innocent party in the divorce suit, but if he had been, his only right was to ask to have the property set apart to him in that proceeding. Not having done so, her title to the property became absolute as between them, from the granting of the divorce.

As the facts are fully found by the court, and the error is in the conclusions of law drawn therefrom, a new trial is unnecessary.

The judgment and order appealed from are reversed, with instructions to the court below to enter judgment on the findings in favor of the defendant.

HOMESTEAD — HUSBAND AND WIFE. — As to conveyances by the husband to his wife, and the legal effect of the same, see extended note to *Alu v. Bauholzer*, 39 Minn. 511; *post*, p. 683, and the cases therein cited. The holding in *Harsh v. Griffin*, 72 Iowa, 608, is in direct accord with the principal case, laying down the rule that the code of Iowa, providing that no conveyance of the homestead shall be valid, unless the husband and wife join therein, does not apply in its provisions to the case where the husband deeds to the wife, in which latter case a deed signed by the husband alone without the wife's signature is valid and binding; compare *Grupe v. Byers*, 73 Cal. 271. A deed from a husband to his wife, or a deed from a wife to her husband, is void at law, but may be good in equity in some of the states. See note to *Turner v. Shaw*, 9 Am. St. Rep. 323-326; *Turner v. Shaw*, 96 Mo. 22; *Miller v. Miller*, 17 Or. 423; *Wood v. Chetwood*, 44 N. J. Eq. 64.

DIVORCE, ITS EFFECT UPON THE PROPERTY RIGHTS of the husband and wife: See *Goode v. Jasper*, 71 Tex. 48.

HABENICHT v. LISSAK.

[78 CALIFORNIA, 351.]

EXECUTION, PROPERTY SUBJECT TO. — SEATS OR MEMBERSHIPS IN A STOCK AND EXCHANGE BOARD of a produce exchange are subject to execution, though the constitution and by-laws of the association declare the legal title and exclusive ownership of the property of the association to be vested in certain officers, "in trust for the benefit and enjoyment of its members"; that "no member under any circumstances shall be deemed to have, or claim, or possess any individual right, title, or interest in the property or assets of the association, except when the same shall be finally dissolved and its affairs wound up by its then remaining members"; that every application for membership is subject to the scrutiny of a committee, and also to be rejected by the negative votes of twenty members; that a member may be expelled for joining any similar association in the city; and that "it is distinctly understood and agreed between the board and each member thereof that the board reserves the right to reject any nominee."

A PROPER MODE OF SUBJECTING TO EXECUTION A SEAT OR MEMBERSHIP IN A STOCK BOARD or produce exchange is by the appointment of a receiver in proceedings supplemental to execution, and directing the defendant to transfer to such receiver his interest in such seat or membership.

Henry E. Highton, for the appellant.

Pillsbury and Blanding, and *Horace G. Platt*, for the respondent.

PATERSON, J. In March, 1884, the plaintiff recovered judgment against defendant for several thousand dollars. About

a year later, a writ of execution was issued on the judgment, and placed in the hands of the sheriff, by whom it was afterward returned wholly unsatisfied. In June, 1885, the proceedings to be reviewed herein — proceedings supplementary to execution — were instituted by the plaintiff upon the unsatisfied judgment in his favor. Upon the examination of the judgment debtor, it was disclosed that he owned a seat or membership in the San Francisco Stock and Exchange Board, and another seat or membership in the San Francisco Produce Exchange. In September, 1885, upon due notice given, plaintiff made a motion for the appointment of a receiver of the two seats above named, with power to sell the same and apply the proceeds thereof in satisfaction of the judgment. The motion was accompanied by an affidavit, setting forth the facts above stated, and the additional facts that defendant had refused to apply the seats in satisfaction of the judgment, and that each of said seats exceeded in value the sum of one thousand dollars. Upon the hearing of the motion, the defendant filed affidavits, in one of which the constitution and by-laws of the two boards were fully set forth. It appears from the constitution and by-laws of the San Francisco Stock and Exchange Board that the legal title and ownership of the property of the association is vested in certain officers, "in trust for the benefit and enjoyment of its members"; that "no member under any circumstances shall be deemed to have, or claim, or possess, any individual right, title, or interest in the property or assets of the association, except when the same shall be finally dissolved and its affairs wound up by its then remaining members"; that every application for membership is subjected to the scrutiny of a committee, whose report, if favorable, entitles the applicant to be balloted for, and whether favorable or unfavorable, the applicant may be rejected by twenty negative votes; that if a member of the association join any similar organization in this state, he may be immediately expelled; that it is "distinctly understood and agreed between the board and each member thereof that the board reserves the right to reject any nominee."

The constitutions and by-laws of the two boards are, so far as the questions before us are concerned, similar in character; and so far as the rights, duties, and interests of the members are concerned, the laws of the two boards are essentially the same as those of other stock and produce exchanges in New York and other states of the Union.

After the hearing upon the motion, the court below made an order appointing C. K. Bonestell, Esq., a receiver of both seats, with power to sell the same and apply the proceeds thereof, after payment of the expenses, to the satisfaction of the judgment, and requiring the defendant to execute any assignment or other instrument necessary for the purpose of vesting his title to the seats in such person or persons as might become purchasers thereof from the receiver, and might be qualified to hold the same under the rules of the respective boards. No provision was made in the order as to the manner of sale, — whether it should be a public or private sale. Thereafter the receiver reported to the court that he had sold the seats to one H. L. E. Meyer, for the sum of two thousand two hundred dollars. This sale was confirmed by the court, the amount realized from the sale was credited on the judgment, and the appellant was directed to execute and deliver assignments of the two seats within five days thereafter, said assignments to be deposited pending the appeal with the clerk of the court. Appellant excepted to the order appointing the receiver, and directing him to sell the seats, and also excepted to the order directing the execution and delivery of the assignments, but no objection was made to the order confirming the sale.

As stated by appellant, two questions are presented here for consideration: 1. Did the seats, or any interest therein, constitute property within the reach of the appellant's judgment creditors? 2. If they did, was the order appointing a receiver, and the order directing the appellant to execute assignments of all his right, title, and interest in and to the seats, a proper mode of reaching that property?

On the first question presented, there is an apparent conflict of judicial opinion. In *Thompson v. Adams*, 93 Pa. St. 55, the court said: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members. It is the mere creation of the board, and of course was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it." In *Pancoast v. Gowen*, 93 Pa. St. 71, the court said: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license, to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fieri facias*. The sheriff's vendee would acquire no title which he could

enforce." It may be said, before passing to the authorities cited on the other side of the question, that in *Thompson v. Adams, supra*, "the plaintiff below was not a member, but had furnished the money by which Richards obtained a seat." He therefore contended that he was the equitable owner of the seat, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. The question for the decision of the court there was, whether or not plaintiff was entitled to the proceeds of the seat, either in full or *pari passu* with the other creditors of said Richards, who at the time of his decease were members of the board, or whether the claims of such members were paramount to the plaintiff's until the former were satisfied. The court decided that the seat "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it." And in *Pancoast v. Gowen, supra*, it did not appear whether there were any claims against the seat by members of the board, but "the answers of the garnishees admitted that Houston, the defendant in the judgment, owned a seat in the stock exchange, against which there were no claims by the members of that body at the time the attachment was issued, but they alleged that claims had since been presented." In the case before us, it is not claimed that the defendant was, at the time of the proceedings in the court below, indebted to any of his associates in either board.

In *Hyde v. Woods*, 94 U. S. 523, the court decided that the proceeds of a sale of the seat in the hands of the treasurer of the board, after payment of the preferred claims of members of the board, could be reached by the assignee in bankruptcy of the person whose seat had been sold. While this was the only matter for decision before the court, Mr. Justice Miller, speaking for the court, said: "There can be no doubt that the incorporeal right which Fenn had to his seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy. . . . Though we have said it is property, it is encumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought nor at any time before or since. That rule en-

tered into and became an incident of the property when it was created, and remains a part of it, into whose hands soever it may come." In *Clute v. Loveland*, 68 Cal. 254, this court said: "The rules expressly authorize each member to dispose of his seat, subject, however, to the condition that before the purchaser can participate in the proceedings of the board he must be elected a member thereof. The power to dispose of the seat includes the power to dispose of it absolutely or conditionally. If a member should sell his seat to one who should not be elected a member of the board, it cannot be doubted that such purchaser would take, subject to the conditions imposed by the rules of the association, the interests of the seller in the property of the association. . . . Whether the disposition be absolute at the beginning, or subsequently becomes so through judicial proceedings, the result is the same." It is true in that case there was an agreement between the parties, Clute and Loveland, by which the latter mortgaged his seat to the former as security for the repayment of moneys due from the one to the other. But this particular feature of the case, if the seat is property, is not enough to distinguish it in principle from the one before us. The constitution and by-laws of the association seem to regard the seats as property. Article 13 of the constitution provides that a member in good standing "shall have the right to dispose of his privileges in the board, and to nominate his successor to fill the vacancy occasioned by his retirement; . . . but the board reserves the right to reject any nominee. In the event of the death of a solvent member, the board will dispose of the vacant seat to the best advantage for the benefit of his widow and children, or those persons who shall be designated by him in his last will and testament," etc. Whenever a member has been deprived of his privileges, or surrenders his membership, it is provided that his seat may be sold, and the president of the board, as trustee, shall hold the proceeds "to discharge the obligations due by such person to members of the board, and any surplus remaining shall, after having satisfied all other claims against him, be delivered to the delinquent, or to any person authorized to receive the same."

In *Londheim v. White*, 67 How. Pr. 467, the court said: "It must be conceded, I think, in the light of all the decisions, that a seat or membership in the stock exchange is property, and should be applied in the same manner as other property of a debtor to the payment of his debts. It may be surrounded

and clogged with conditions and restrictions, but still it is property available for the payment of debts, and can be made available for that purpose, subject to and by an observance of those restrictions and conditions. . . . This question has been passed upon so frequently by the courts as to make it no longer doubtful or debatable." In *Grocers' Bank v. Murphy*, 60 How. Pr. 426, the court, referring to the contention that such a seat is not tangible property, said: "If such a result may be attained, the efforts of an active imagination cannot circumscribe the associations human ingenuity will produce, to thus transmute veritable assets into intangible, and yet most substantial and valuable, shadows." Judge Choate, in the United States district court, southern district of New York, upon an application for an order requiring a bankrupt to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser of the seat, said: "It [the seat] is a part of the bankrupt's business assets, or more generally of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, mere technicalities,—cobwebs which the law is strong enough to break through": *United States v. Ancarola*, 9 Rep. 303; see also *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301.

We conclude, therefore, that the weight of authority and the better reasoning support the proposition that such a seat or membership is property, and should be applied as other property of a debtor to the payment of his debts. To hold that it cannot be thus applied would establish a rule giving to the members of such associations the power to invest fortunes under the name of licenses and privileges, and by their constitutions and regulations to establish a law of exemption for the same.

Upon the other question raised, we think there can be little doubt. In *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120, it was held that proceedings supplementary to execution are intended to take the place of the creditors' bill; and in such a proceeding, it was proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention. It was always the rule in a proceeding known as a creditor's bill, as we understand it, to appoint a receiver after the execution had been returned *nulla bona*: Note to

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Ward v. Beebe, 15 Abb. Pr. 373; *Stoors v. Kelsey*, 2 Paige, 418; *Hadden v. Spader*, 20 Johns. 554; *Londheim v. White*, *supra*; *United States v. Ancarola*, *supra*.

Freeman, referring to such seats, says: "They have been spoken of by the courts as property; and it has been said that on bankruptcy they would pass to the assignee, subject to the rules of the stock board. If this be true, they must be subject to execution in some mode; perhaps by creditor's bill, or by proceedings supplemental to execution, in which a receiver could be appointed, and a transfer to him compelled": 1 Freeman on Executions, 2d ed., sec. 110; 2 Id., sec. 419; Code Civ. Proc., sec. 564, subd. 4. No claim was made in the court below that a better price could have been realized for the seats than was obtained through the sale by the receiver; and as stated before, no objection was made to the order of the court confirming the sale of the seats for two thousand two hundred dollars, nor has any appeal been taken therefrom.

The orders are affirmed.

EXECUTIONS — WHAT PROPERTY SUBJECT TO. — Whether seats in a stock and exchange board are property, and being property, whether they are subject to execution, see 1 Freeman on Executions, 2d ed., sec. 110; 2 Id., sec. 419; *Barclay v. Smith*, 107 Ill. 349; 47 Am. Rep. 437; *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301.

EXECUTIONS — SUPPLEMENTARY PROCEEDINGS. — For a general discussion of this topic, see extended note to *Lathrop v. Clapp*, 160 Am. Dec. 509-515; *Pacific Bank v. Robinson*, 57 Cal. 520; 40 Am. Rep. 120; *Collins v. Angell*, 72 Cal. 513; *McCormick etc. Co. v. Gates*, 75 Iowa, 343; *Burkett v. Bowen*, 118 Ind. 379; *Rodman v. Harvey*, 102 N. C. 1.

[IN BANK.]

MAGEE v. NORTH PACIFIC COAST RAILROAD CO.

[78 CALIFORNIA, 430.]

PLEADING. — PLAINTIFF SUING FOR INJURIES WHICH HE CLAIMS TO HAVE SUFFERED FROM THE NEGLIGENCE of the defendant need not make any independent or explicit allegation that he himself was without fault. Therefore, in an action by a brakeman to recover of a railroad company for injuries occasioned to him by reason of the company's negligence in maintaining an insufficient fence adjoining its track, and in not keeping a cow-catcher in a proper position, he need not allege that he was ignorant of the defects in the fence, nor of the improper position of the cow-catcher.

EVIDENCE. — IN AN ACTION BY A BRAKEMAN TO RECOVER COMPENSATION FOR INJURIES RESULTING FROM NEGLIGENCE in not maintaining a proper fence

along the right of way of a railway company, evidence tending to show that the plaintiff was ignorant of the defects in the fence at the time he was injured is admissible and relevant, although his complaint does not allege such ignorance.

NOTICE TO SERVANT OF DEFECT. — RIGHT OF SERVANTS TO RECOVER ON ACCOUNT OF THE MASTER'S NEGLIGENCE IS NOT AFFECTED BY NOTICE OF ANY DEFECTS other than such as the servants ought, in the exercise of ordinary prudence, to have foreseen might imperil their safety. Hence, there is no error in denying a nonsuit moved for on the ground that the plaintiff knew of the condition of the fences along the railroad track, from defects in which he was injured. A continuance of a servant in his work in the face of known danger only raises a question for the jury.

DUTY OF SERVANTS TO KNOW OF DANGERS AND DEFECTS. — A servant has a right to rely upon a master's inquiry, because it is the master's duty to inquire, and the servant may justly assume that all things are fit and suitable for the use which he is directed to make of them.

W. H. L. Barnes, for the appellant.

Hepburn Wilkins, for the respondent.

SHARPSTEIN, J. This appeal is from a judgment and order denying a motion for a new trial. The first ground upon which appellant's counsel insists that the judgment should be reversed is, that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff alleges that he was in the employ of the defendant as brakeman and baggage-master, and was seriously injured by the train being thrown from the track by a bull which had intruded upon it. He further alleges that the fences inclosing the track were insufficient to prevent the intrusion of cattle thereon, and that the cow-catcher was not in a position to remove obstacles from the track; that the defendant knew of the defects in the fence, and the improper position of the cow-catcher. But he does not allege that he was ignorant of the defects in the fence, or of the improper position of the cow-catcher; and the omission so to allege constitutes, as appellant contends, a failure to state facts sufficient to constitute a cause of action.

In *McGlynn v. Brodie*, 31 Cal. 376, it is said, *arguendo*, that the pleader in that case had not "overlooked the necessity of averring in his complaint the essential fact 'that plaintiff had no knowledge that the same [cupola] was insecure.'"

While it is sufficiently clear that the court then thought such an averment in a complaint necessary to constitute a cause of action in cases like the one then before it and the one now before us, the expression of an opinion upon a question not before the court for decision is not entitled to the same

consideration as it would be entitled to if such a question had been involved in the case.

In *Robinson v. W. P. R. R. Co.*, 48 Cal. 409, it was held that in actions based on the negligence of defendants, "the complaint need not allege that the injury was done without fault of the plaintiff."

In *McQuilken v. O. P. R. R. Co.*, 50 Cal. 7, the case of *Robinson v. W. P. R. R. Co.*, *supra*, is cited on this point approvingly.

In *Indianapolis etc. R. R. Co. v. Klein*, 11 Ind. 38, which was an action by an employee of a railroad company against the company to recover damages for an injury received whilst in the employ of the company as a brakeman, there was a demurrer to the complaint. In passing upon it the court said: "It is objected to this complaint that there is no averment of a want of knowledge by the plaintiff of the defects complained of. In other words, it is insisted that the plaintiff should in his complaint negative a knowledge or notice by him of the road and machinery. We do not think such averment necessary. It was a matter of defense which would more properly appear in the answer."

In *Crane v. Mo. Pac. R. R. Co.*, 87 Mo. 588, the court says: "It has been settled in this state, since the case of *Thompson v. N. M. R. R. Co.*, 51 Id. 191, 11 Am. Rep. 443, that contributory negligence is a matter of defense, and that the *onus* of establishing it is on the defendant, and the rule has been reiterated in the late case of *Stephens v. City of Macon*, 83 Mo. 345. If the *onus* of proving contributory negligence or knowledge on the part of the plaintiff of defective machinery rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery, neither one of which he would be required to prove to make out his case, but which the defendant would be required to prove to make out his defense." In *Hackford v. N. Y. C. R. R. Co.*, 19 N. Y. 310, the court said: "No precedent of the common-law declaration can be found, I think, in which the plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof." This seems to accord with the rule that "it is not necessary to state matter which would come more properly from the other side," — the meaning of which is, "that it is not necessary to anticipate the answer of the adversary, which, according to Hale,

C. J., is 'like leaping before one comes to the stile': Stephen on Pleading, 350.

In *Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115, the court says: "In the multitude of cases of this general character, we know of none which requires of the pleader any independent or explicit allegation that the plaintiff himself was without fault."

Our conclusion is, that the demurrer was properly overruled.

On the trial, while the plaintiff was testifying as a witness in his own behalf, he was asked by his counsel, "Did you ever know of any defect in the fence?"

Defendant's counsel objected to the question "as incompetent and inadmissible under the pleadings," it being "nowhere alleged in the complaint that there was any defect in the structure of the fence that was unknown to plaintiff." The objection was overruled, and before the witness answered the question, counsel for plaintiff put the question in the following form: "If there were any defects in the fence along the right of way, were any such defects known to you up to the seventeenth day of April, 1882,—that is, the time when this suit was commenced?" The witness answered, "No, sir."

Counsel. — "They were not?"

Witness. — "They were not."

It does not appear that counsel for defendant renewed his objection to the question as it was finally put and answered, but we think he should, nevertheless, have the benefit of his objection and exception, as the change in the form of the question was one of phraseology only.

If the question was irrelevant, the objection was improperly overruled; otherwise not. We think it was relevant; for while, as has already been shown, the complaint contained no allegation of plaintiff's ignorance of the defects in the fence, the answer "alleges and charges the fact to be that whatever injuries were sustained by said plaintiff were caused solely and wholly by his own carelessness and negligence, and that but for his own carelessness and negligence he would not have been injured." This allegation must be deemed denied by plaintiff, and it raised an issue to which the evidence was applicable, and if so, such evidence was not irrelevant nor incompetent.

We perceive no error in that ruling.

After the plaintiff rested, defendant's counsel moved for a nonsuit, on the grounds: 1. That there was no evidence that

the train was not properly run, or that plaintiff did not know the manner in which it was run; that is, with no cow-catcher in front; 2. That the evidence shows that plaintiff knew of the condition of the fence.

Conceding that the evidence shows that plaintiff knew of the preposterous manner in which the train upon which he was injured was operated, and knew that cattle had previously intruded upon the track, it does not, in our opinion, follow that a nonsuit should have been granted. The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant ought, in the exercise of ordinary prudence, to have foreseen might endanger his safety: *Shearman and Redfield on Negligence*, 214; *Dale v. St. Louis R. R. Co.*, 63 Mo. 455; *Mehan v. Syracuse etc. R. R. Co.*, 73 N. Y. 585.

It has been expressly held that mere continuance of a servant in his work in the face of a known danger only raises a question for the jury: *McMahon v. Port Henry Iron Co.*, 24 Hun, 48; *Hawley v. Northern Central R. R. Co.*, 17 Id. 195; 82 N. Y. 370.

In fact, judgments for damages have been sustained in many cases where the servant had knowledge of the particular defect or danger which resulted in his injury: *Clarke v. Holmes*, reported in 2 Thompson on Negligence, 953; *Fairbank v. Haentzsch*, 73 Ill. 236; *Dorsey v. Phillips*, 42 Wis. 583.

In *Clarke v. Holmes*, *supra*, Cockburn, C. J., said: "But the question whether the injury of which plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff had any share in bringing it about, is one wholly for the jury."

The motion for nonsuit was properly overruled.

Consistently with the views above expressed, we cannot disturb the order denying the motion for a new trial. There is no evidence that the plaintiff knew of the particular defect or danger which resulted in his injury. He knew that cattle had previously been on the track, but he did not know that effective measures had not been taken, before the occurrence of which he complained, to prevent their coming on. We think he had a right to assume that such measures had been taken as would prevent the recurrence of that danger. At least, there was evidence to justify the jury in finding that he had no knowledge of the particular defect or danger which resulted in his injury.

In *Trask v. Cal. S. R. R. Co.*, 63 Cal. 96, where a train-hand was injured, and the court found that the injury was caused by the unskillful, improper, and negligent manner in which the defendant constructed its road, it was held that "the plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which defendant's road was constructed."

"It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is, that when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is chargeable with actual notice as to matters concerning which it was his duty to inquire; and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know": *Shearman and Redfield on Negligence*, sec. 287.

We think that rule fairly deducible from a majority of the cases in which the question was involved. There are cases, however, to the contrary, at least seemingly so, among which is *Sweeney v. C. P. R. R. Co.*, 57 Cal. 15, in which it was held that a new trial was properly granted on the ground of insufficiency of the evidence to justify the verdict, because, "from the testimony of the plaintiff's witnesses, and as the case stood when the plaintiff rested, it would hardly be rational to deny he had known for months, indeed years, before the accident which caused his death that the road at or for miles each side of the point where the collision occurred was not protected by fences and cattle-guards; and being an intelligent, reasonable human being, and engaged constantly as a locomotive-engineer over this particular portion of the road, he must be deemed to have known that cattle were likely to intrude upon the track, and that thereby there was danger of just such an accident as resulted in his death."

In that case, the motion for a new trial was granted. In this case, it was denied. In that case, it does not appear that the road had ever been fenced,—a fact of which an employee might more reasonably be supposed to take notice than of the fact that there was a defect in an existing fence.

And a very large discretion has been accorded to trial courts in the matter of granting or refusing new trials in this state. But we will not attempt to parry the force of that decision by suggesting a distinction which is not obvious.

The principle upon which the court proceeded in that case is not, in our opinion, supported by the weight of authority, and does not commend itself to our favorable consideration.

We think the question of the plaintiff's knowledge of the danger to which he was exposed by reason of the omission to fence the road was one for the jury.

In this case, we are satisfied that the verdict of the jury ought not to be disturbed on the ground that it was not justified by the evidence.

It appears to us that the questions discussed were fairly submitted to the jury by the court in its instructions.

Judgment and order affirmed.

NEGLIGENCE — PLEADING. — Contributory negligence is purely a matter of defense, which a plaintiff is not bound to negative in his complaint: *Robeth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637; *O'Connor v. Missouri Pacific R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 364; *Potter v. Chicago etc. R. R. Co.*, 20 Wis. 533; 91 Am. Dec. 444, and note 445; *Hammond v. Schweitzer*, 112 Ind. 246; *Georgia Pacific R. R. Co. v. Propst*, 85 Ala. 203; *Railroad Co. v. Harman*, 83 Va. 553. For contributory negligence is a matter of defense which cannot be presumed, but must be proved by the defendant affirmatively: *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Burns v. Chicago etc. R'y Co.*, 69 Iowa, 450; 58 Am. Rep. 227, and note; *Gaynor v. Old Colony etc. R'y Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Little Rock etc. R. R. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245; *Bogenschutz v. Smith*, 84 Ky. 230; *Hocum v. Weitherick*, 22 Minn. 154; *Robinson v. Railway Co.*, 48 Cal. 409; *Lee v. Gas Light Co.*, 98 N. Y. 115; *Thompson v. Railroad Co.*, 51 Mo., 190; 11 Am. Rep. 443. But in the state of Indiana the contrary rule seems to be in force, so that there the plaintiff must aver the absence of contributory negligence on his part: *Brannen v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411; *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638, and note; *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470, and note.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY SERVANT: See *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733, and note 736; *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806, and note 810; *Hosic v. Chicago etc. R'y Co.*, 75 Iowa, 683; 9 Am. St. Rep. 518, and note 522; *Robeth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *Farren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note 264; *Kean v. Detroit etc. Mills*, 66 Mich. 277; 11 Am. St. Rep. 492, and note 502.

[IN BANK.]

SESLER v. MONTGOMERY.

[73 CALIFORNIA, 493.]

SLANDER, PUBLICATION OF. — COMMUNICATION FROM A HUSBAND TO HIS WIFE, not in the presence of a third party, does not constitute a publication within the meaning of the law of slander.

Estee, Wilson, and McCutchen, J. C. Martin, and W. F. Goad,
for the appellant.

W. W. Allen, W. H. H. Hart, and A. R. Cotton, for the respondent.

McFARLAND, J. Action for slander. Verdict and judgment for plaintiff. Defendant appeals from the judgment, and from an order denying a new trial.

The evidence shows that the alleged slanderous words were spoken (if at all) in the house of the defendant, in a conversation addressed exclusively to his wife; and the question to be determined is this: Did the speaking of the words under these circumstances to his wife alone constitute a "publication" within the meaning of that word as used in the definition of slander? (The plaintiff was eavesdropping, and claims to have heard the alleged slanderous words from a point outside of the door of the room in which defendant and his wife were talking.)

The codes of this state provide how marriages may be entered into, and how divorces may be obtained; and they also have certain provisions, different from the rules of the common law, about the property of the spouses, and, to a limited extent, about their power to make contracts, etc. But in the codes there is no attempt made to change the essential nature of marriage, or to state its manifold incidents and consequences, or to establish new rules for the solution of the various questions which arise out of those incidents and consequences. Moreover, although the codes define slander as a "false and unprivileged publication" of certain matters, it does not declare what shall constitute "publication." For the determination of these questions, therefore,—as there are no provisions about them in the codes,—we must look to the common law, which is the basis of our jurisprudence: Pol. Code, sec. 4468; *Van Maren v. Johnson*, 15 Cal. 312.

It is admitted to be the settled rule that there can be no publication within the meaning of the law of slander, unless

the words alleged to be slanderous are spoken to and in the presence of a third person; that is, a person other than the one who speaks, and the one of whom the words are spoken. A man entirely alone cannot commit slander by talking aloud to himself. And the final question to be solved is, whether a wife, when spoken to by her husband in the privacy of home, and not in the presence of others, is a "third person" within the meaning of the law under review; or whether, under those circumstances, there should be applied the doctrine that the husband and wife are civilly one person.

There is no doubt of the general common-law rule that the civil existence of the wife is merged in that of her husband. Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband": Vol. 1, p. 442. Upon this principle of the legal union of husbands and wives, most of their rights, duties, and disabilities depended. They could not be witnesses for or against each other, because of the maxims, *Nemo in propria causa testis esse debet*, and *Nemo tenetur seipsum accusare*. And upon this ground, it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law: Hawk. P. C. 448, sec. 8; 2 Russell on Crimes, 690; *People v. Richards*, 67 Cal. 412; 56 Am. Rep. 716.

It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law; and we have seen no authentic account of the explosion. There always were some exceptions to the rule from the earliest history of the common law; and modern legislation and decision have merely created additional exceptions. The general rule still obtains, save where an exception has been legally established. And we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court in New York (*Trumbull v. Gibbons*, 3 City Hall Rec. 97), in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of

the marriage relation, — the most confidential relation known to the law, — should restrain a court from establishing the exception upon which the judgment in the case at bar rests. When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be. It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would destroy all opportunity for confidential conference, advice, or suggestion. To a curious person asking what had occurred between a husband and wife in the seclusion of their home, the appropriate answer would be, *Id est nullum tui negotii*.

It has been held in another state that there was a sufficient publication of a libel where a letter was sent to a wife containing defamatory matter about her husband; and it is argued that the court making the decision must have held the wife to be a third person: *Scheneck v. Scheneck*, 20 N. J. L. 208. Whether or not that decision was a correct exposition of the law, it is clear, at least, that another principle was involved. As the court say in that case: "Such a communication made directly to the wife is an attempt to poison the fountain of domestic peace, conjugal affection, and filial obligation, at their very sources." There the exception which was allowed to the general rule was in support of the confidential relation of marriage; while in the case at bar the exception sought to be established would be destructive of that relation.

Our conclusion is, that a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander. It follows from this conclusion that the judgment in the case at bar was erroneous.

Judgment and order appealed from reversed, and cause remanded.

SLANDER — PUBLICATION OF. — For a general discussion upon this subject, see 3 Lawson's Rights and Remedies, section 1236, page 2190, and cases cited in note 10. In a recent North Carolina case, it was held that calling an innocent woman a "whore" in the hearing alone of the speaker's wife was a charge of incontinency within the meaning of the North Carolina statute: Code, sec. 1113; *State v. Shoemaker*, 101 N. C. 690. The facts in the case of *Wensham*

v. *Morgan*, L. R. 20 Q. B. 635, are very peculiar. The plaintiff had been the servant of defendants. The plaintiff, on being discharged, demanded the return to him of a paper which had been given him by prior employers certifying to his good character. When, upon his request, the paper was returned to him by Mrs. Morgan, he found that her husband had indorsed thereon words to the effect "that the plaintiff had been dismissed for staying out all night without leave." He thereupon sued both the husband and wife for libel and for malicious damage to the document. The trial judge held that as the only publication of the libel must have been in delivering by husband to wife of the "character" with the defamatory words thereon, the plaintiff could not recover for the libel, and that the recovery of damages to the paper by writing thereon must be limited to one shilling. Two judges of the appellate court expressed their conclusions as follows:—

HUDDESTON, B.: "Two questions arise in this case: 1. Whether there was a publication under the circumstances; and 2. Whether the learned judge was right in taking upon himself the issue as to the amount of damages to which the plaintiff was entitled. With respect to the first of those points, this is, as far as we know, the first time it has ever been alleged in cases of this kind that the handing over of a libel by the libeler to his wife is a publication. I think that the question can be decided on the common-law principle that husband and wife are one. The uttering of a libel to the party libeled is clearly no publication for the purposes of a civil action. And if a libel is uttered on a privileged occasion to a husband when his wife is present, it has been held that her presence does not take away the privilege. In *Odgers on Libel and Slander*, 2d ed., p. 153, there is a reference to *Trumbull v. Gibbons*, 3 City H. Rec. 97, an American case, of which there is a note in *Townshend on Slander and Libel*, as follows: 'Gibbons wrote defamatory matter of Trumbull, and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained, and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without any instruction to the wife as to how she should dispose of the copies so sent to her. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was contended for defendant, — 1. That there was no publication by defendant; 2. Or no publication within the state. The second point was overruled, and as to the first it was held that the delivery of the manuscript to be printed was a publication, although a delivery to a wife in confidence would not be publication, yet, in the case then before the court, the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant.' We think it our duty to hold that, according to a well-recognized principle, husband and wife are in the same position, and therefore that the uttering of a libel by a husband to his wife is no publication, in cases apart from the married women's property act, and that on that ground the decision of the learned judge was right."

MANISTY, J.: "I come to the same conclusion. The case, although in one view a comparatively small one, involves a very important principle. On the first point the maxim and principle acted on for centuries is still in existence; viz., that as regards this case, husband and wife are in point of law one person. The earlier authorities on this point are collected in *Montague Lush on Husband and Wife*, page 3. It would be enough to say that that is the law, and the ground of the law. But what is the real foundation of it? It is

after all a question of public policy, or, as it has been well called, social policy. No doubt that principle has been interfered with by judge-made law. Public opinion has altered in some circumstances, and no better illustration of that can be given than the change of view as to deeds of separation between husband and wife. But if public policy is considered, what is there to show any change in judicial opinion or public policy with respect to communications between husband and wife hitherto held sacred? It has been argued that in some cases it might be well that publication of slander by a man to his wife should be actionable. But look at the other side. Would it be well for us to lay down now that any defamation communicated by a husband to a wife was actionable? To do so might lead to results disastrous to social life, and I for one would be no party to making new law to support such actions. I may say incidentally that there is no pretense for arguing that this action could be maintained against the female defendant, — for all that she did was to hand the alleged libel to the plaintiff, — so judgment should have been entered for her."

IN RE INGRAM.

[78 CALIFORNIA, 503.]

HUSBAND INHERITS THE ENTIRE ESTATE OF HIS DECEASED WIFE when she dies intestate, leaving no issue, father, mother, brothers, nor sisters, though she left surviving her children and grandchildren of a deceased sister.

James M. Seawell, for the appellants.

Henry I. Kowalsky and Maurice C. Baum, for the respondent.

McFARLAND, J. Hannah G. Ingram died intestate, and left surviving her John W. Ingram, her husband, but left no issue, and no surviving father or mother, brother or sister. There were living, however, at the time of her death certain children and grandchildren of a deceased sister, who are the appellants herein. A decree of distribution was rendered May 10, 1888, in the court below, by which one half of the estate was distributed to the said surviving husband (or rather to his assignee Kowalsky), and the other half to the said children of the deceased sister. Afterward, upon due notice and hearing, on July 18, 1888, the decree was amended so as to distribute the whole of the estate to the said assignee of said surviving husband. From this amendment of the decree the appeal herein is taken.

It is entirely beyond doubt that the whole of the estate should have been distributed to the surviving husband. Paragraph 5 of section 1386 of the Civil Code is too clear to present any difficulty of construction whatever. It is as follows:

"If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." Paragraph 2 of said section refers to the case where there is a surviving brother or sister, and provides that in such case, if there be also children of the deceased brother or sister, they shall take their parents' share by right of representation. It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister ought to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.

2. We think the court had power to modify the decree upon the ground stated in the motion to amend, and that the power was properly exercised.

The judgment of the court below is affirmed.

HUSBAND AND WIFE.— "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife": Civ. Code Cal., sec. 1386, par. 5.

SUCCESSION TO ESTATES OF INTESTATES.— *Personal Property, Succession to by the Common Law.*— In the early days of common law, the right of succession to the personal property of one who died without making any disposition thereof by will or otherwise can hardly be said to have been recognized at all. The theory of the law was, that the king had the supreme care to provide for all his subjects, and therefore seized the goods of the intestate for the purpose of caring for and disposing of them, for the burial of the decedent, the payment of his debts, and for the benefit of his wife and children, if he had any, and if not, for the benefit of other persons of the blood of the decedent. This prerogative of the king appears to have been exercised some time by his ministers of justice, and perhaps in the county courts. It was also, in some instances, granted as a franchise to the lords of manors, and others who had a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts. Still later, the crown invested church authorities with this branch of the prerogative, on the theory that "none could be found more fit to have such care and charge of the transitory goods of the deceased than the ordinary, who all his life had the care and charge of his soul." The goods of the intestate became vested in the ordinary as a trustee, to dispose of them in *pious usus*, and the clergy seem, in the exercise of this trust, to have overlooked the just claims of the creditors and kindred of the deceased. By statute (13 Edw. I., c. 19), the ordinary was required to pay the debts of the intestate so far as his goods extended, but as to the residue remaining after such payment, it still remained in the hands of the ordinary, to be applied to whatever purpose his conscience should approve. At length, by the statute 31 Edw. III., sec. 1, c. 11, ordinaries were required to appoint the next and most lawful friends of the dead person to administer his goods, and the administrators so appointed

were made accountable to ordinaries as "executors be in the case of testament, as well of the time past as the time to come": Williams on Executors, 403, 404. The administrators, however, after the payment of the debts and funeral expenses of the deceased, remained entitled exclusively to enjoy the residue of his effects. "The hardships of this privilege upon those of kin to the intestate in equal degree with the administrator was the occasion of making the statute of distribution: 22 & 23 Car. II., c. 10. This statute, after empowering the ordinary, on the granting of administration, to take a bond of the administrator, with two or more sureties, proceeds, in section 3, to enact as follows: And also that the said ordinaries and judges respectively shall and may and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral and just expenses, of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise, to the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations hereafter set down; and the same distribution to decree and settle, and to compel such administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws; saving to every one supposing him or themselves aggrieved their right of appeal, as was always in such cases used": Williams on Executors, 1484.

"*Descent or Hereditary Succession is a Title whereby a person, on the death of his ancestor, acquires his estate as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately upon the death of his ancestor, and the estate so descended on an heir is in law called the inheritance.*" It may well be doubted whether the right which one of the spouses has upon the death of the other in the latter's property can properly be called an estate by descent or hereditary succession, or whether one of the spouses may, with propriety, be designated as an heir of the other under any circumstances, where the right to succeed is dependent solely upon the pre-existing marriage. As a matter of fact, however, each of the spouses has a right to an important portion of the estate of the other upon the death of the latter, and this right we shall now proceed to consider.

Nature and Origin of Husband's Succession to Wife's Personality. — As we have already shown, the right to the succession of personal property was not fully recognized or protected at the common law. The kindred, however, or persons who might be regarded as having the best equitable right to the personal property of a decedent, were appointed to administer thereon, and after the payment of debts and funeral expenses, were allowed to dispose of the residue as to them seemed best. During the life of a wife, the husband had the right to reduce all of her personal property to his possession, and upon the exercise of such right, the title thereto vested in him: See note to *Coplinger v. Sullivan*, 37 Am. Dec. 577-581. If the husband had neglected to exercise this right during the life of his wife, he was, at her death, entitled to administer on her estate, and upon being appointed to such administration, and after the payment of her debts, he took all the wife's personality to himself, and became the sole owner thereof. If, during the husband's lifetime, he failed to take out administration on the estate of his deceased wife, it was at first held that her next of kin were entitled to administration, but upon being appointed administrators, they held the property as trustees for the benefit of the next of kin of the husband. It was finally determined, in

such cases, that the relatives of the husband, rather than those of the wife, were entitled to administer upon her estate, unless it appeared that the latter, and not the relatives of the husband, were for some reason beneficially interested therein: Schouler on Executors and Administrators, sec. 496; Williams on Executors, 1489; *Miller v. Miller*, 1 J. J. Marsh. 169; 19 Am. Dec. 59; *Bryan v. Brooks*, 25 Ga. 622; 71 Am. Dec. 194; *Weeks v. Jewett*, 43 N. H. 540; *Olough v. Bond*, 6 Jur. 50.

With Respect to the Real Estate of the Wife, the Interest Which the Husband had therein after her death was dependent upon the birth of a child during the coverture, in which event the husband was entitled to the estate as tenant by the curtesy in all realty of which the wife had been seised during the coverture. An estate by the curtesy is a freehold estate for the term of the natural life of the husband. "It is in many respects but a continuance of the estate of the wife, though it is regarded more in the nature of an estate by descent than purchase": 1 Washburn on Real Property, 159; see *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433, and note.

Nature of Succession of Husband or Wife to Estate of the Other. — Though the right of a husband or wife to an interest in the estate of his or her deceased spouse be conferred by statute, there is some difference of opinion with respect to the character or proper designation of the interest of the surviving husband or wife. It has sometimes been regarded as an estate by descent, and the party entitled to it as an heir: *Fletcher v. Holmes*, 32 Ind. 497. The better opinion, however, is, we think, that the husband or wife is not to be regarded as an heir, and that the interest which he or she has in the estate of the deceased spouse should be treated as existing by virtue of the marital relation rather than as heir to the decedent: *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251; *Richardson v. Martin*, 55 N. H. 45; *Journell v. Leighton*, 49 Iowa, 601; *McMenomy v. McMenomy*, 22 Id. 148. It is true that in Kansas, where a father died subsequently to the death of his son, the widow of the latter was allowed a share in the estate as an heir of her deceased husband, but the point is not noticed by the court, the only contention apparent from the decision being with respect to an entirely different proposition: *Fletcher v. Wormington*, 24 Kan. 259. Generally, it is impossible for a surviving husband or wife to derive from or through a deceased husband or wife an interest in any estate to which the latter was not entitled during his or her lifetime. Hence if a husband or wife who is a devisee or heir apparent dies before the testator or ancestor, the surviving spouse cannot take any interest under such devise or by descent, because none ever accrued during the lifetime of the deceased husband or wife: *Prather v. Prather*, 58 Ind. 141; *Lane v. McKinstry*, 31 Ohio, 640. A widow of a deceased husband cannot inherit from a child who died in the lifetime of such husband: *In re Overdieck's Will*, 50 Iowa, 244. Though a bequest be made to a person and his heirs, the widow will not be permitted to take under the designation of heir, unless it is apparent from the will that the word "heirs" was not used in its ordinary signification: *Richardson v. Martin*, 55 N. H. 45.

Husband's Interest in Estate of Deceased Wife. — In some portions of the United States the statute of 22 & 23 Car. II. were never in force, nor was that portion of the common law recognized which gave the husband as one of his marital rights the title, after the death of his wife, to all her personal estate, whether previously reduced to his possession or not. This was the case in Vermont, Arkansas, and Illinois, where it was held that the wife's personal property vested in her administrator, and the husband's interest, if any he had, was dependent upon distribution after administration: *Holmes*

v. *Holmes*, 28 Vt. 765; *Cox v. Morrow*, 14 Ark. 603; *Townsend v. Radcliffe*, 44 Ill. 446. In Connecticut, it seems to have been held that statutes protecting the separate property of married women, and giving them power to dispose thereof, divested the husband's marital right to succeed thereto upon the death of the wife: *Baldwin v. Carter*, 17 Conn. 201. But there was one generally recognized principle respecting the separate estates of married women which deserves, and has generally received, attention in determining how far statutory innovations upon the common law have divested the husband's marital rights in his wife's personalty. This principle is thus stated by Mr. Schouler in section 106 of his treatise on husband and wife: "The quality of separate estate ceases on the death of the wife; and if her husband survives her, he becomes entitled to the property as though it had never been settled to her separate use. For the separate use was created only for the marriage state, and was not designed to extend beyond the dissolution of marriage, or when the necessity of the trust should be no longer felt. Thus choses in possession settled to the wife's separate use vest in the husband absolutely upon his survivorship. The wife's separate choses in action may be recovered by him in his right as administrator. So, doubtless, her separate chattels real go to the husband as survivor. In short, the wife's separate property, upon the wife's death, is freed from its peculiar incidents, and becomes like any other estate of hers which may remain at her decease. And it seems clear that her husband may be tenant by the curtesy as usual, if not expressly excluded from all marital interest": *Proudley v. Fielder*, 2 Mylne & K. 57; *Molony v. Kennedy*, 10 Sim. 25; *Barnes v. Underwood*, 47 N. Y. 351; *Sloper v. Cottrell*, 6 El. & B. 501; *Bird v. Pegrum*, 13 Com. B. 650; 17 Jur. 579.

Husband's Succession as Affected by Statutes concerning Separate Estates of Wives. — Following this principle, all statutes regarding the rights and powers of married women over their separate estate must be so interpreted as to limit the husband's marital rights, so far only as may be required to permit the operation of the statute in the cases specified in it. Hence if a statute declares that the proceeds of the sale of the separate property of a married woman shall, if invested in her name, or in the name of a trustee for her benefit, be regarded as her separate estate, such statute can have no effect when such proceeds are not so invested, but on the contrary, with her knowledge and approval, are represented by a promissory note made payable to her husband: *Hawley v. Burgess*, 22 Conn. 284. A statute permitting a wife to dispose of her separate estate by will or otherwise does not detract from her husband's right to succeed to the whole of her personalty in default of such disposition: *Runsom v. Nichols*, 22 N. Y. 110; *Shumway v. Cooper*, 16 Barb. 556; *Lockwood v. Stockholm*, 11 Paige, 87; *Vallance v. Baush*, 17 How. Pr. 243; 28 Barb. 633; *Ryder v. Hulse*, 24 N. Y. 372. So a statute declaring that her separate estate shall be inherited by her descendants is operative against the husband's marital right only when she leaves such descendants: *Barnes v. Underwood*, 47 Id. 351. In other words, the husband's marital right to succeed to the whole of the wife's personalty continues to exist in all those contingencies in which it has not been destroyed by the clear words of some statute: *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Jones v. Brown*, 34 N. H. 439; *Atherton v. McQueston*, 46 Id. 205; *Watson v. Bonney*, 2 Sand. 405; *Burk v. Valentine*, 53 Barb. 412; 5 Abb. Pr., N. S., 164; *Barnes v. Underwood*, 47 N. Y. 351; *Whitaker v. Whitaker*, 6 Johns. 112. In nearly all the states, however, statutes have been enacted under which the interests of husbands in the estates of their wives and of wives in the estates of their

husbands have been substantially modified; and it remains for us to call attention to these statutes.

Personal Estate of Wife Leaving Husband and One or More Children. — The first contingency we shall consider is that of a wife dying intestate leaving surviving her a husband and one or more children. As to personalty, the common-law rule yet prevails in Rhode Island, Connecticut, New Jersey, Maryland, Delaware, Virginia, Kentucky, North Carolina, and Oregon. He is entitled to one half of such personal estate in Alabama and Massachusetts; to one third in Arizona, Indiana, and New Hampshire; to a life estate in the whole in Maryland; to share equally with the children and the issue of deceased children in Florida and Pennsylvania; and in Maine, New York, Ohio, Illinois, Minnesota, Kansas, Texas, California, Washington, Dakota, Idaho, Montana, Wyoming, Utah, South Carolina, and Mississippi to the same share which the wife would have had in his separate estate had she survived him. What her share is under such circumstances we shall consider hereafter. In Wisconsin, Nebraska, Tennessee, Missouri, and Arkansas he is allowed no interest whatever in his wife's personalty: See Stimson's American Statute Law, sec. 3106 b; *Warren v. Englehardt*, 13 Neb. 283.

Real Estate of Wife Leaving Husband and One or More Children. — In the real estate of a deceased wife, the surviving husband's estate in the majority of the states is that of a tenant by the curtesy as at the common law. Such is the rule in New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Delaware, Virginia, West Virginia, North Carolina, Kentucky, Missouri, Oregon, and Alabama: Stimson's American Statute Law, sec. 3105; Schouler on Husband and Wife, sec. 423; *Lynde v. McGregor*, 13 Allen, 182; *Wolf v. Wolf*, 37 Ill. 55; *Armstrong v. Wilson*, 60 Id. 226; *Hatfield v. Sneden*, 54 N. Y. 280; *Leach v. Leach*, 21 Hun, 381; *Mack v. Rock*, 13 Daly, 103.

The tenancy by the curtesy as it now exists in some of these states differs in essential respects from the like tenancy at the common law. In Ohio and Oregon it is not dependent on the birth of an heir: Schouler on Husband and Wife, sec. 423; *Elliott v. Teal*, 5 Saw. 249. Where the statute confers upon married women absolute power to dispose of their separate real estate, then the result must inevitably follow that such disposition will defeat the curtesy: *Pool v. Blakie*, 53 Ill. 495; *Stokes v. McKibbin*, 13 Pa. St. 267. By the Michigan statute of March 11, 1844, it was enacted "that if the wife, seised of an estate in her own right, shall, at her death, leave issue by a former husband, to whom the estate may descend, such issue shall take the same discharged from the right of the surviving husband as tenant by the curtesy." Under this statute, the second husband, while there was living issue of the first marriage, "had no estate of any kind in the premises, either possessory or in expectancy": *Hathon v. Lyon*, 2 Mich. 93. In this state, as well as in several others, the husband does not become a tenant by the curtesy initiate on the birth of issue capable of inheriting. He has no estate whatever until the death of his wife: *Tong v. Marvin*, 15 Id. 59; *Hill v. Chambers*, 30 Id. 422; *Beach v. Miller*, 51 Ill. 206; *Thurber v. Townshend*, 22 N. Y. 517; *Ross v. Adams*, 28 N. J. L. 160; *Porch v. Fries*, 18 N. J. Eq. 204. Statutes conferring upon married women more ample powers over their separate estates, or permitting them to retain as separate estate property which, by the common law, might have vested in their husbands, while they modify, do not destroy his estate by the curtesy. They very generally make his estate dependent on his surviving her, and on no disposition being made of it

in her lifetime in the mode sanctioned by the statute. In whatsoever remains after her death, the husband has his estate by the curtesy: *Porch v. Price*, 18 N. J. Eq. 204; *Cole v. Van Riper*, 44 Ill. 58; *Hatfield v. Sneden*, 54 N. Y. 280; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Prall v. Smith*, 31 N. J. L. 244; *Houston v. Brown*, 7 Jones, 226; *Freeman v. Hartman*, 45 Ill. 27.

In Arizona and Indiana, a surviving husband takes one third of his deceased wife's realty in fee, after payment of debts and expenses, in lieu of his estate by the curtesy; and in New Hampshire, if the issue left are not his, and he has no estate by the curtesy, he takes a life estate in one third of the real estate of which the wife died seised. In Georgia and Florida, the husband shares the deceased wife's realty with the children and their descendants *per stirpes*: *Hooper v. Howell*, 52 Ga. 315. In Louisiana, the husband does not succeed to any of his wife's separate estate. In Iowa, Texas, California, Washington, Dakota, Idaho, Montana, Wyoming, Utah, South Carolina, and Mississippi, the interest of a husband who survives his wife is equivalent to that of a wife who survives her husband: Stimson's American Statute Law, sec. 3105.

Personal Estate of Husband Leaving Widow and One or More Children.—The interest of a widow in the personal estate of her deceased husband was, by the statute of 22 & 23 Car. II., made subject to the payment of his debts and funeral expenses. Of the residue after such payment, the statute made it the duty of ordinaries, and of all other persons entitled to make distribution, to distribute "one-third part of the said surplusage to the wife of the intestate": Williams on Executors, 1485, 1490; Schouler on Executors and Administrators, sec. 497.

In many of the states, certain allowances are made to the surviving wife, either for the support of herself or of herself and the minor children who are under her care. These are not properly to be regarded as advancements to her out of her share of the estate, but merely as provisions for the support of the family until the estate can be settled by appropriate proceedings in the courts. We shall not refer to the statutes on this subject, but confine ourselves to the share or interest to which the widow is entitled upon the final settlement of the estate. In a majority of the states, the share of a widow in the personal estate of her deceased husband remains as fixed by the statute of 22 & 23 Car. II., before referred to; viz., one third of the surplus remaining after the payment of the debts and funeral expenses of the deceased, and the expenses of administration. This is her interest under the statutes of New Hampshire, Massachusetts, Maine, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Maryland, Delaware, Virginia, West Virginia, North Carolina, Kentucky, Arkansas, Texas, Florida, and California: Stimson's American Statute Law, sec. 3106; *South v. Hay*, 3 T. B. Mon. 88; *Harris v. Harris*, 12 Gill & J. 474; *Stearns v. Stearns*, 1 Pick. 137.

In Alabama, California, Florida, Indiana, New Mexico, and Kansas, if there is but one child surviving, and no descendants of any deceased child, the widow's share is increased to one half: Civ. Code Cal., sec. 1386, subd. 1; *Dodge v. Beeler*, 12 Kan. 524; Stimson's American Statute Law, sec. 3106.

The widow's share of the personalty, irrespective of the number of children surviving, is one half in Oregon, Washington, and Michigan; and she shares equally with her children, counting the issue of a deceased child as one, in Wisconsin, Nebraska, Tennessee, Missouri, Arkansas, and Missis-

issippi, and where there are two or more children, in North Carolina and Alabama. In the last-named state, if there are more than four children, the widow's share is always one fifth.

In Arkansas, if a decedent leaves a widow or children, and it is made to appear to the court that the value of his estate does not exceed three hundred dollars, the court must make an order "that the estate vest absolutely in the widow or children, as the case may be." The effect of this statute is to give "the right to the widow to retain in her hands the whole estate, without liability to account for it, if it be in fact of less value than three hundred dollars": *Harrison v. Lamar*, 33 Ark. 827; *Hampton v. Physic*, 24 Id. 561.

Real Estate of Husband Leaving Wife and Child or Children. — At the common law, every wife became entitled to dower "in all lands, tenements, or hereditaments, corporeal or incorporeal, of which the husband may have been seised in fee or in tail" during the coverture. Dower was absolute in a wife, surviving her husband, whether or not she had ever borne him any children. Upon his death, she was entitled to have assigned to her for life one third of all such real property.

A widow is entitled to dower by the statutes of New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, Connecticut, New York, New Jersey, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Maryland, Delaware, Virginia, West Virginia, North Carolina, Kentucky, Tennessee, Missouri, Arkansas, Oregon, and Georgia; to an estate in fee in one third of the husband's estate remaining after debts and charges are paid in New Hampshire, Connecticut, California, Nevada, Washington, Dakota, Idaho, Montana, Utah, South Carolina, and Florida. Her interest is increased to one half when there is but one child surviving, and no issue of any deceased child, in California, Indiana, Nevada, Washington, Dakota, Utah, and Florida; and is one half, regardless of the number of children, in Colorado (*Hanna v. Palmer*, 6 Col. 156), Wyoming, and Kansas. She has a life estate in the undivided one third of the husband's realty in Pennsylvania and Texas; and may share it equally in fee with the children in Georgia, except that, however numerous the children, she need never accept less than one fifth. In some of the states in which she is entitled to dower, she may elect to accept, in lieu of it, one third of the real estate in fee remaining after the payment of debts, as in New Hampshire and Florida, or may share equally with the children and the issue of those deceased, *per stirpes*, as in Missouri, Arkansas, and Mississippi: *Hickman v. Ruff*, 55 Miss. 549.

In Indiana and Iowa, the widow is entitled to one third of all the realty of which the husband has been seised during the coverture, free from all his debts and the expenses of administration, unless it has been sold at execution or judicial sale, or she has relinquished her interest therein: *Perry v. Borton*, 25 Ind. 274; *Myers v. Myers*, 37 Id. 307; *Brannon v. May*, 42 Id. 92; *Bowen v. Preston*, 48 Id. 367; *Smith v. Zuchmeyer*, 53 Iowa, 14; *Linton v. Crosby*, 54 Id. 478; *Moore v. Weaver*, 53 Id. 11; *Mansur v. Hinkson*, 94 Ind. 395.

In Indiana, however, if such realty exceeds ten thousand dollars in value, she is, as against creditors, entitled to one fourth only; and in the event of its exceeding twenty thousand dollars, to one fifth only. In Minnesota, she is entitled, subject to the payment of debts and expenses of administration, to one third of all the real estate of which the husband has been seised during coverture, and to which she has not relinquished her rights. The share to which a surviving wife is entitled in New Mexico is free of all claims of

creditors, unless the estate exceeds in value twenty thousand dollars, in which event she is entitled, as against them, to one fifth only. In Arizona and Louisiana, neither a surviving husband or wife is entitled to any interest in the separate estate of his or her deceased spouse when there are any children surviving.

Estate of Husband or Wife Dying without Issue, but Leaving Kindred. — The second contingency to which we shall call attention is that of the death of a husband or wife leaving a surviving spouse and other kindred, but no children, nor descendants of deceased children. By the statute 22 & 23 Car. II., the failure of lineal descendants entitled a surviving wife to one half instead of one third of the personal estate of her deceased husband. Otherwise it made no difference in the interest which a surviving husband or wife had in the estate of the deceased consort. Even if there were no heirs whatever, the other half of the deceased husband's personalty, instead of vesting in the surviving wife, escheated to the crown: Williams on Executors, 1485, 1490; Schouler on Executors and Administrators, sec. 497; *Cave v. Roberts*, 8 Sim. 214.

If the Wife is Survivor, and there is No Issue, nor Any Representative of Deceased Issue, she is entitled to all the husband's personal estate, subject to the payment of debts, in Illinois (*Sutherland v. Harrison*, 86 Ill. 363), Nebraska, West Virginia, Tennessee, Texas, Oregon, Washington, and Florida; to one half of such personalty in New Hampshire, Maine, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, Kentucky, Missouri, Arkansas, and Alabama; and to all personalty acquired by the deceased husband from his wife remaining in kind at his death, free from his debts, in Virginia and Missouri. In Massachusetts she is entitled to all personalty up to five thousand dollars, and to half of any excess above ten thousand dollars: *Elliott v. Elliott*, 137 Mass. 116; in Michigan, to all up to one thousand dollars, and half of all in excess of that sum.

The share of a surviving husband in the personal estate of his wife, under like circumstances, extends to all remaining after payment of debts, in Massachusetts, Rhode Island, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Kentucky, Illinois, Texas, Oregon, and Washington; to one half in Michigan, New Hampshire, Maine, Connecticut, New York, and Missouri. In Iowa, the avails of an insurance policy on the life of a deceased husband or wife vest in the survivor, whose rights are paramount to those of the creditors of the decedent: *Rhode v. Bank*, 52 Iowa, 376.

With respect to the real property of a husband dying without issue, or the descendants of deceased issue, the surviving widow takes all the real estate in fee, subject to the payment of debts, in Ohio, Wisconsin, Kansas, Oregon, Colorado, Georgia, Mississippi, and Florida: Stimson's American Statute Law, sec. 3109; *Barry v. Barry*, 15 Kan. 587; but see *Gibbons v. Brittenum*, 56 Miss. 252; three fourths in Indiana and Wyoming: *Matthews v. Pate*, 93 Ind. 443; one half in New Hampshire, Massachusetts, Vermont, Connecticut, Pennsylvania, Illinois, Iowa, Missouri, Arkansas, Texas, California, Nevada, Washington, Dakota, Idaho, Montana, Utah, and South Carolina: Stimson's American Statute Law, sec. 3109; *Smith v. Zuchmeyer*, 53 Iowa, 14; *Dodds v. Dodds*, 26 Id. 311; *Billings v. Billings*, 2 McCord Ch. 403; Civ. Code Cal., sec. 1382, subd. 2; *Sears v. Sears*, 121 Mass. 267; to a life estate in the undivided one half in Maine, Delaware, and Arkansas; to a life estate in the whole in Michigan, Nebraska, and Arizona: Stimson's American Statute Law, sec. 3109; see also *Birmingham v. Birmingham*, 53 Miss. 611; *Jinks v. Langdon*, 21 Ohio St. 362. In Vermont, Connecticut, New York, New Jersey, Minnesota,

Maryland, Virginia, West Virginia, North Carolina, Kentucky, Tennessee, and Alabama, her interest is not increased by the fact that her husband died without issue.

On the death of a wife without issue, her surviving husband has, in addition to his estate by this curtesy, real estate in fee to the value of five thousand dollars in Massachusetts; all the wife's estate to the value of two thousand dollars, and one half the excess in lieu of curtesy, in Vermont: *Harrington v. Harrington*, 53 Vt. 649; half of her real estate for life in New Hampshire. His share is the same as his wife's interest in his realty would have been had she survived him, in Wisconsin, Kansas, Oregon, Colorado, Georgia, Mississippi, Florida, Wyoming, Iowa, Texas, California, Nevada, South Carolina, Indiana, Wyoming, New Hampshire, Connecticut, and Illinois.

Though there be kindred, and no issue, the share of the surviving husband or wife is augmented in certain states by giving him or her a total or partial preference over relatives who would have had capacity to inherit had the intestate died unmarried. Thus in Idaho, Utah, South Carolina, and Nevada, if the decedent left no issue, nor father nor mother, one half of the realty vests in the surviving husband or wife: *Clark v. Clark*, 17 Nev. 124; Stimson's American Statute Law, sec. 3115. In Indiana, New Mexico, and Arizona, the whole estate, both real and personal, vests in such circumstances in the surviving spouse: *Shaw v. Breece*, 12 Ind. 392; *Fontain v. Houston*, 86 Id. 205; *Hoffman v. Bacon*, 50 Id. 379; *Sullivan v. McGowen*, 33 Id. 139; *Pickens v. Hill*, 30 Id. 269. In New York, if the decedent left no surviving parent, the widow is entitled to half the personal estate, and also to the remaining half up to two thousand dollars in value. The excess of this one half over two thousand dollars goes in equal shares to the decedent's mother if she is still living, and to the brothers and sisters and the representatives of deceased brothers and sisters: Stimson's American Statute Law, sec. 3115; *Dougherty v. Stillwell*, 1 Bradf. 300.

If there is no issue, parent, brother, nor sister, nor their issue, all the realty of the decedent vests in fee in the surviving husband or wife, in Missouri, Texas, California, Nevada, Washington, Dakota, Idaho, Montana, and Utah. The same result follows as to personal estate in Michigan, Maryland, Missouri, Texas, California. All the personalty vests in the surviving spouse in New York, though the decedent may have left grand-nephews or grand-nieces. In California, as shown by the principal case, the issue of a brother or sister of a deceased wife cannot inherit, unless there are also brothers and sisters surviving.

HUSBAND OR WIFE, BUT NO KINDRED. — If there is a surviving husband or wife, and no kindred, the real estate vests in the surviving spouse in fee in Massachusetts, Maine, Vermont, Rhode Island, Pennsylvania, Illinois, Michigan, Iowa, Minnesota, Maryland, Virginia, West Virginia, North Carolina, Tennessee, Arkansas, South Carolina, Alabama; and the personal estate follows the same course in Massachusetts, New York, Pennsylvania, Illinois, Maryland, Delaware, Virginia, West Virginia, Arkansas, and South Carolina: Stimson's American Statute Law, sec. 3123; *Board T. C. Co. v. Riddelsburgh C. Co.*, 65 Pa. St. 435; *Decker v. Hughes*, 38 Me. 153. If a deceased husband was married more than once, and left no kindred, in Iowa his estate may be distributed to the surviving wife, and to the representatives of the wife deceased, in equal shares; and if all the wives are dead, then to the heirs of all by right of representation in Iowa, Missouri, and Maryland. In the last-named state, this provision extends to the kindred of deceased husbands, when a women who has been more than once married dies leaving no sur-

viving husband nor kindred. If a decedent left no relatives nor surviving spouse, but had been married, and kindred of the deceased husband or wife survive, the latter inherit, "in like manner as if such husband or wife had died entitled to the estate by purchase," in Rhode Island, Maryland, Virginia, West Virginia, Kentucky, and Florida.

COMMUNITY PROPERTY. — It must be remembered that what we have previously written does not apply to the descent of community property in those states wherein that property is permitted to exist. On the death of a wife, all the community property vests in her husband in California, Nevada, Idaho, and Montana. In Louisiana, if either husband or wife dies, leaving no ascendants nor descendants, his or her share of the community property is held by the "survivor in usufruct during his or her natural life"; and if the dying spouse left surviving issue of the marriage with the survivor, such survivor shall "hold a usufruct during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue." This usufruct ceases upon the survivor contracting a second marriage. The title, however, to one half of the community property vests in the heirs of the deceased wife at the moment of her death: *Phelan v. Az*, 25 La. Ann. 379; *Daniel v. Ivy*, 26 Id. 659; Stimson's American Statute Law, secs. 3400, 3401. In Washington, Texas, and Arizona, on the death of a wife, her share in the community descends in the same mode as does the share of a husband on his death: Id., secs. 3402, 3403. Upon the death of the husband, one half of the community property goes to the surviving wife, subject to the payment of debts, in California, Idaho, and Montana, while it all goes to the surviving wife without administration in Nevada and Washington. In Texas, Washington, and Arizona, the community property goes one half to the surviving husband or wife, subject to community debts; the other one half to the legitimate issue of the deceased spouse, and in default of such issue, to the surviving husband or wife. In California, Idaho, and Montana, the husband's one half of the community property goes to his descendants, and if there are none, it is distributed like his separate property.

Husband or Wife of a Second Marriage. — In some of the states, the fact that the husband has been more than once married may affect the share of the surviving widow in his estate. In Indiana, a wife is, by virtue of her marital right, entitled to one third of the real estate of which her husband was seised during the continuance of the coverture, unless this right has been lost by her relinquishment, or in some other mode designated by statute. To this one third every wife is entitled, whether her husband has been previously married or not; nor can he defeat her interest therein by any conveyance of the property in which she does not unite in a mode prescribed by statute: *McClamrock v. Ferguson*, 88 Ind. 208; *Slack v. Thatcher*, 84 Id. 418. The other two thirds the husband may convey without her assent; but if he does not convey it, and there is no issue of the last marriage, this two thirds vests in the surviving widow. She has no power, however, to alienate it, and the children or descendants of the children by his previous marriage are regarded as her forced heirs, and upon the death of the surviving widow, succeed to all of the property which she has acquired by descent from her husband: *Utterback v. Terhune*, 75 Id. 363; *Scott v. Silvers*, 64 Id. 76; *Teter v. Clayton*, 71 Id. 237. There is some ambiguity or contradiction in the decisions in this state respecting the one third of which we have spoken, and to which the widow is entitled irrespective of any attempted alienation by her husband. The earlier decisions indicate that this third is to be regarded as her property absolutely, and the portion of which his children are regarded

as forced heirs is confined to the other two thirds: *Hendrix v. McBeth*, 87 Ind. 287; but we understand the later decisions as holding that the children of the prior marriage are to be regarded as forced heirs as to the whole of the estate when there is no issue of the last marriage: *Tharp v. Hanes*, 107 Id. 324. If the surviving widow leaves living issue by her deceased husband, and also issue by a prior marriage with another person, the one third which she acquired by virtue of the marriage with her last husband descends on her death to her children by both marriages, to the exclusion of the husband's children by his former marriage: *McClannahan v. Trafford*, 46 Id. 410; *Heavenridge v. Nelson*, 56 Id. 90. In Ohio, if the surviving husband or wife marries again, and dies intestate, and without issue, any estate, real or personal, which came to him or her from the estate of a former husband or wife descends to the children of such husband or wife or their issue. If a husband dies without issue, the wife takes title to his whole estate; but if she marries again, and dies without issue by the second marriage, then the property which she acquired by her former marriage vests, one half in her brothers and sisters or their representatives, and one half in the brothers and sisters of the deceased husband whence such property came, or their representatives: *Spiller v. Heeter*, 42 Ohio St. 100. In Kentucky, the widow of a second marriage having no children is entitled to one third only of the personal estate of her deceased husband if there are living children of his former marriage: *Tomppert v. Tomppert*, 13 Bush, 327.

Forfeiture of Husband or Wife's Rights. — A divorce which completely severs the bonds of matrimony before existing between the parties, as it destroys the marital relation, must, for most purposes, destroy the rights and obligations growing out of that relation. Hence upon the granting of a divorce the right which either spouse might have had in the estate of the other had the marriage been terminated by death is extinguished: *Billan v. Hecklebrath*, 23 Ind. 71; *Chenoweth v. Chenoweth*, 14 Id. 2; *Whitsell v. Mills*, 6 Id. 229; *Reynolds v. Reynolds*, 24 Wend. 193. A husband or wife may have so grossly violated the marital obligations as to entitle the other spouse to have the marriage annulled, and then, in the absence of such annulment, the question arises, whether the crime against marriage may be successfully interposed against the claim of the guilty survivor to share the estate of the innocent decedent. Since the enactment of the thirty-fourth chapter of the statute 13 Edward I., a wife who voluntarily left her husband, and went away to dwell with another in adultery, has been barred from demanding dower in his lands, unless her husband condoned her fault, and suffered her to again live with him. The courts proceeded a step further by determining that a wife who deserted her husband with his assent, and who thereafter lived in adultery, or who, though at first compelled to leave him, refused to return when requested, and thereafter lived in adultery, was likewise barred of her dower: *Hetherington v. Graham*, 6 Bing. 135; *Bell v. Nealy*, 1 Bail. 312; 19 Am. Dec. 686; but if the husband first deserted the wife, then her subsequently living in adultery did not destroy her right to dower: *Graham v. Law*, 6 U. C. C. P. 310; *Cogswell v. Tibbetts*, 3 N. H. 41; *Shaffer v. Richardson*, 27 Ind. 122; *Reel v. Elder*, 62 Pa. St. 316. Statutes like that of 13 Edward I. are in force in many of the United States: *Goodwin v. Owen*, 55 Ind. 243; *Bell v. Nealy*, 1 Bail. 312; 19 Am. Dec. 686. In Indiana, "if a husband shall abandon his wife without just cause, failing to make suitable provision for her, or for his children, if any, by her, he shall take no part of her estate": *Dye v. Davis*, 65 Ind. 474. In Pennsylvania, "whenever any husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife,

or shall desert her, her real and personal property, howsoever acquired, shall be subject to her free and absolute disposal during life, or by will, and in case of intestacy shall go to her next of kin as if he were previously dead": *Black v. Tricker*, 59 Pa. St. 13. Under this statute, drunkenness and a failure to support must concur. Neither, in the absence of the other, will destroy the erring husband's property rights in the estate of his deceased wife: *D'Arros's Appeal*, 89 Pa. St. 51; *Cremer's Estate*, 12 Phila. 153.

An agreement entered into between a husband and wife without the intervention of a trustee, whereby the one relinquishes all claim against the estate of the other, is void, in a majority of the states, for want of capacity in married persons to contract with each other: *Whitney v. Clossen*, 138 Mass. 49. Where, however, a husband and wife have already ceased to live with each other as such, agreements entered into between them and a trustee, recognizing their inability to live together, and making provision for their property rights and interests, are very generally enforced, unless inequitable; and doubtless, by such an agreement, duly executed, either spouse may relinquish his or her interest in the property of the other, both present and prospective: See note to *Stephenson v. Osborne*, 90 Am. Dec. 367-370.

Canons of Descent at Common Law. — We come now to the consideration of the question of descent proper, by which we mean the transmission of the estate of one who never married, or, in the event of his or her marriage, then of that portion of the decedent's estate in which the surviving husband or wife has no interest. Formerly, six canons of descent were recognized, by the application of which it was supposed that every conceivable case could be determined. These canons are now so nearly obsolete that we shall content ourselves with repeating them, without the present consideration of their interpretation, or their application to the many cases which may arise under them. The first was, "that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend." The second declared that "the male shall be admitted before the female." Daughters, however, notwithstanding this canon, succeeded to inheritances before collateral relatives; and females were preferred to more remote males. The third canon provided "that where there were two or more males in equal degree, the oldest only should inherit; but the females altogether." The fourth was, "that all lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the ancestor himself would have done had he been living." Under the fifth canon, "on the failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the purchaser, subject to the three preceding rules." The sixth and last canon was, "that the collateral heirs of the person last seised must be his next collateral kinsman of the blood." The first of these canons remains in force to a limited extent in the state of New Jersey. By the statute of that state, an intestate's father or mother may inherit his estate. Beyond this the first canon remains in force, and excludes from an inheritance a grandparent who is next of kin to the decedent: *Taylor v. Bray*, 32 N. J. L. 182. The second and third canons have, so far as we can ascertain, been entirely abrogated by statute. The fourth canon is very generally adopted either by the courts or as part of our statutory law, as will hereafter appear in discussing the interests of the children of the intestate's children, and of children of his brothers and sisters, and in treating of the right of representation. The fifth and sixth canons have been substantially modified. Descent need not, in most states, be traced to the first purchaser,

as implied by the fifth canon, nor need the ancestor from whom an inheritance is claimed have been actually seized, as required by both the first and the sixth canons.

No Heir Apparent has Any Vested Interest in the Estate of his Ancestor while the latter is living. What person shall inherit an estate, or whether it shall be inherited by any person whomsoever, is a matter of public policy to be regulated and controlled by the legislature. Hence, at any time prior to the vesting of an estate by the death of its owner, the line of inheritance may be changed by statute, and the statute effecting such change will control the succession of such estate, and may increase or diminish the number of the heirs at law; may entirely destroy the expectancies of the heir apparent, or may transfer a right of inheritance to those who did not previously possess it: *Gregley v. Jackson*, 38 Ark. 487; *Cooley's Constitutional Limitations*, 359. After the interest of an heir has become vested by the death of his ancestor, it remains subject to administration, and may be sold to pay the charges of administration and the debts of the decedent: *Overturf v. Dugan*, 29 Ohio St. 230.

Aliens, Rights of, to Transmit or Receive an Inheritance. — By the rules of the common law, an alien could neither acquire nor transmit property by descent. It was therefore fatal to one's claim to an inheritance that he was himself an alien, or that it was necessary for him to trace his claim through an alien: *Moore v. White*, 6 Johns. Ch. 635; *Orr v. Hodgson*, 4 Wheat. 453; *Elmendorf v. Carmichael*, 3 Litt. 472; 14 Am. Dec. 86; *Dumoncel v. Dumoncel*, 13 Ir. Eq. 92; 3 Greenl. Cruise, 319, 320. This rule of the common law was adopted to some extent in the United States, more particularly when persons claiming inheritances were non-resident aliens, and the property claimed was real estate: *People v. Conklin*, 2 Hill, 67; *Jackson v. Fitz Simmons*, 10 Wend. 9; 24 Am. Dec. 198; *Yeaker's Heirs v. Yeaker*, 4 Met. (Ky.) 33; 81 Am. Dec. 530; *McClenaghan v. McClenaghan*, 1 Strob. Eq. 295; 47 Am. Dec. 532; *Brown v. Pearson*, 41 Iowa, 481. Therefore, when in the case of the descent of property it would have vested in one had he not been an alien, his right was displaced in favor of the next person in the line of succession: *Renner v. Muller*, 44 Jones & S. 535; or if there were several heirs, who, had they not been aliens, were equally entitled to the succession, it vested only in those who are qualified to take it as being either native-born or naturalized citizens of the United States: *King v. Ware*, 53 Iowa, 97; *Leary v. Leary*, 50 How. Pr. 122. The inheritance between brothers is immediate, and therefore unaffected by the alienage of their father: *Smith v. Mulligan*, 11 Abb. Pr., N. S., 438. In the majority of the United States, statutes have been enacted under which the right of aliens both to hold and to transmit property by descent has been conferred. This is true in Maine, Rhode Island, Pennsylvania, Ohio, Michigan, Wisconsin, Iowa, Minnesota, North Carolina, Tennessee, Missouri, Arkansas, California, Oregon, Nevada, Washington, Dakota, Idaho, South Carolina, Alabama, Mississippi, Florida, and New Mexico: *Stimson's American Statute Law*, secs. 6013-6016; *Eustache v. Roadquest*, 11 Bush, 42; *Settlecast v. Schrumph*, 35 Tex. 323; *Duke v. Milne*, 17 La. 312; 36 Am. Dec. 613; *Lareau v. Davigon*, 5 Abb. Pr., N. S., 367; *McCarty v. Deming*, 4 Laus. 440. This privilege is, however, restricted in New Hampshire, Connecticut, and Indiana to resident aliens: *Stimson's American Statute Law*, sec. 6013; *Murray v. Kelly*, 27 Ind. 42; and in New Jersey, Pennsylvania, Maryland, Virginia, and West Virginia to alien friends. In Colorado, Montana, and Utah, non-resident aliens must appear and claim the property within five years from the time their right to the succession accrued, or be barred: Cal

Civ. Code, secs. 672, 1404; Stimson's American Statute Law, sec. 6013. In Kentucky, aliens may hold lands by descent, if they become citizens before process of escheat is actually commenced. In New York, if non-resident aliens are entitled to a succession, the title of such of them as are males of full age is defeasible to the state, unless before the consummation of proceedings instituted for that purpose they file a declaration according to law of their intention to become citizens: *Goodrich v. Russell*, 42 N. Y. 177. It seems also to be necessary in Pennsylvania, Indiana, Delaware, and Texas that alien residents make declaration of their intentions to become citizens in order to retain their inheritance of real estate. Recently, the tendency of legislation in the United States has been against the acquisition and holding of real estate by aliens. The Illinois statute of 1887 declared that no non-resident aliens, firm of aliens, or corporation incorporated under the laws of any foreign country, are capable of acquiring title to or taking or holding any real estate by descent or devise or otherwise, except that the heirs of such aliens who have before June 16, 1887, acquired lands in the state, and those who may acquire lands under the provisions of this statute, may take such lands by devise or descent, and hold the same for a space of three years, and no longer, if such alien is twenty-one years of age at the time; if not, for a term of five years from the time of acquiring such land; and if, in such time, such lands so acquired by such alien heirs have not been sold to *bona fide* purchasers for value, or such alien heirs have not become actually residents of the state, the lands shall revert and escheat to the state. Resident aliens who have declared their intention to become citizens of the United States, and alien females who have in good faith become actual residents of the United States, are thereupon authorized to take and hold real estate, to him or her or his or her heirs and assigns forever. If any alien who has declared his intention of becoming a citizen shall not become naturalized within six years after such declaration, and shall be living, and shall not have sold his real estate to purchasers in good faith, such real estate shall revert and escheat to the state. In Colorado, by a statute passed in the same year, non-resident aliens who acquire property by devise, descent, or purchase at a judicial sale may hold the same for three years, with the right of alienation, after which period they are forfeited. In Nebraska, by statute also passed in 1887, no non-resident alien can acquire or hold any real estate by purchase, devise, or descent, provided that aliens owning real estate at the passage of such statute may convey, mortgage, or devise it, and if they die intestate, it may descend to their heirs as if citizens. No non-resident alien who has not declared his intention to become a citizen of the United States shall hereafter own, hold, or possess, by right, title, or descent, any real estate in the state. If any non-resident alien who is an owner of real estate at the time of the passage of the act shall die, his lands shall escheat to the state, and his heirs be paid for the full value thereof, to be ascertained by an appraisement: Supplement to Stimson's American Statute Law, sec. 6013.

Whether or not an alien may inherit or may transmit an inheritance by descent is a question which cannot be determined from a mere inspection of the statutes of the state in which it arises. What property rights an alien may have in the United States is regarded as a proper subject for regulation and determination by treaty between the United States and the country of which he is a citizen, and such treaty when made must be treated in all the states as the supreme law of the land, and given precedence over any local law with which it may conflict. The local law with respect to the right of an alien to inherit or transmit an inheritance is operative only when there is

no treaty upon the subject. If there is a treaty, its provisions control, whether there is local legislation upon the subject or not: *Hauenstein v. Lynham*, 100 U. S. 483; *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Orr v. Hodgson*, 4 Id. 453; *Fairfax v. Hunter*, 7 Cranch, 627.

Seisin of Ancestor, when Essential. — At the common law, descent of real property could only be from one seised thereof. During the continuance of an estate in dower or by the curtesy, or any other particular estate under which the tenant was entitled to possession, the person in whom the remainder or reversion was vested did not hold an inheritable estate, unless he had been seised of the property in his lifetime. He did not constitute a new stock of descent. Descent could only be derived from the one who was seised when the particular estate was created: *Jackson v. Hindrick*, 3 Johns. Cas. 214; *Bates v. Shrader*, 13 Johns. 260; *Jackson v. Hilton*, 16 Id. 96. The possession of one parcener or tenant in common was, however, the possession of all; and the possession of a tenant for years was counted as the possession of his lessor. Hence it was no objection to one claiming by descent that the estate at the time the descent was cast was in the possession of a tenant for years, or a tenant in common or parcener of the ancestor, under whom the claim was made: 3 Washburn on Real Property, 3d ed., 13. The rule of the common law requiring one claiming as heir to trace his descent from one actually seised is not, so far as we can ascertain, in force in any portion of the United States: Stimson's American Statute Law, sec. 3010. "A remainderman or reversioner, therefore, becomes a proper stock of descent, and the remainder or reversion of one dying intestate is to be distributed among his heirs in the same manner as estates in possession. The heir here takes all the real estate owned by the ancestor at the time of his death, and the maxim of the common law that *seisina facit stipitem, non jus*, is practically abolished": 3 Washburn on Real Property, 14. It is therefore sufficient that the ancestor had an interest in the property, whether he was seised thereof or not; and there is one familiar instance where, under the statutes in many of the states, an heir may inherit that in which his ancestor never had any vested interest. If a devise or bequest is made to a child, or other descendant of the testator, the death of the beneficiary before the testator rarely causes the devise or legacy to lapse in the United States, if the beneficiary leave issue. Such issue inherit as though the devise or legacy had vested in their parent in his or her lifetime, unless the will shows a clear intent to exclude them: Stimson's American Statute Law, sec. 2823. In New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, Ohio, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Maryland, Virginia, West Virginia, Kentucky, Tennessee, Missouri, California, Oregon, Nevada, Washington, Dakota, Montana, Utah, Georgia, and Arizona, the like rule prevails when a devise or bequest is made to any relative of the testator. In New Hampshire, Rhode Island, Iowa, Maryland, Virginia, West Virginia, Kentucky, Tennessee, and Georgia, the devise or bequest does not lapse if there are any heirs of the beneficiary: Id. The word "heirs" is not confined to descendants, but probably excludes a surviving husband or wife: *Blackman v. Wadsworth*, 65 Iowa, 80.

Conflict of Laws. — If, at the time succession to an estate by descent is claimed, it appears that a statutory change has been made in the laws of succession since the death of the ancestor under whom the right is claimed, the law in force at the time of such death must control, rather than that which is subsequently enacted. Upon the death of every person, his estate immediately vests in those who by the laws which then exist are declared to

be his heirs. The interest which they thus acquire by descent is, subject to the payment of debts of their ancestor and the expenses of administration, assured to them as unalterably as if it had been acquired by purchase, and it is beyond the power of the legislature even, should they make the attempt, to divest a title previously acquired by descent: *Hosac v. Rogers*, 6 Paige, 415; *Norman v. Heist*, 5 Watts & S. 171; 40 Am. Dec. 493. Personal property is by a fiction of law presumed to attend the person of its owner, and to be present in that state or country in which he has his domicile. For the purpose, therefore, of determining who shall succeed to such personal property as heirs of the owner, resort must be had to the laws of the state or country in which the owner had his domicile at the time of his death, in preference to the law of the locality in which such personalty happened to be situate: *Gibson v. Dowell*, 42 Ark. 164; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; 22 Am. Dec. 37; *Goodall v. Marshall*, 11 N. H. 88; 35 Am. Dec. 472; *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451. Real estate, on the other hand, is subject to the exclusive jurisdiction of the state in which it is situate, and the right of persons claiming as heirs of the deceased owner of such real estate must be determined solely by the law of the country in which it is. The law of the domicile of the decedent is in such cases entirely irrelevant: *Smith v. Kelly*, 23 Miss. 167; 55 Am. Dec. 87; *Harvey v. Ball*, 32 Ind. 98; *Lingen v. Lingen*, 45 Ala. 410; *Hawley v. James*, 7 Paige, 213; 32 Am. Dec. 623; *McCullum v. Smith*, Meigs, 342; 33 Am. Dec. 147; *Bryan v. Moore*, 11 Martin, 26; 13 Am. Dec. 347; *Apferson v. Bolton*, 29 Ark. 418. It has sometimes happened, however, that a class of persons have been permitted to remain within a state without being subject to its laws, but owing obedience to the laws of their own tribe or nation, and where this is the case, the laws to which such persons are subject may control the descent of their property, rather than the laws of the state in which they and it are situate. Thus in Kansas it has been determined, for these reasons, that lands belonging to a Shawnee Indian descended according to the laws of his tribe, rather than those of the state of Kansas: *Brown v. Steele*, 23 Kan. 672.

Children and Children's Children. — All of the property of a decedent, real and personal, if he or she has never been married, and if married, all such property which has not vested in the surviving husband or wife, passes, in the event of his or her leaving children surviving, or children surviving and the issue of deceased children, to such children in the case first supposed, and in the second to such children and issue of the deceased children. If there are surviving children, and no issue of deceased children, the inheritance must be divided equally among such children. If there are surviving children and issue of deceased children, the share which would have descended to the parents of such children's children will descend to them. In other words, the surviving children take *per capita*, while the issue of the deceased children take *per stirpes*. To this extent there is substantial unanimity in the statutes of the several states: Stimson's American Statute Law, secs. 3101, 3102. If, however, none of the children of the decedent have survived, but two or more of them have left children surviving them, these children's children no longer take *per stirpes*, but share equally the estate of their grandparent; and upon this subject there is also substantial unanimity in the statutory law in this country: *Id.*, sec. 3103. The descent to children may, therefore, be considered under three contingencies: 1. Where the heirs of the deceased consist solely of his children; 2. Where they consist of children and the issue of deceased children; and 3. Where they consist of grandchildren only. Both in the first and second contingencies the estate may

be regarded as being equally divided among the children of the intestate, the share of the deceased children going to their children as their representatives: *Dutoit v. Doyle*, 16 Ohio St. 100; *Eshlman's Appeal*, 74 Pa. St. 42; *Pearson's Appeal*, 74 Id. 121; *Dodge v. Beeler*, 12 Kan. 524. The consideration of the third contingency will be resumed in the latter part of this note.

WHO ENTITLED TO SHARE AS CHILDREN OF DECEDENT. — Before proceeding further, it is well to pause to consider who are entitled to share the estate of an intestate under the designation of children. That this term includes all the legitimate children of the intestate in being at the time of his death, whether the issue of one or more lawful marriages, is so obvious as to require no support from authorities, and no necessity of illustration from the decided cases: *Bates v. Cotton*, 32 Miss. 266; *Coffman v. Bartsch*, 25 Ind. 201; *McMakin v. Michaels*, 23 Id. 462. In Indiana, a statute declared that when a husband or wife died intestate, leaving no child, and no father or mother, the whole of his or her property should go to the surviving spouse. The word "child," as here employed, was construed as equivalent in meaning to "children or their descendants"; and a grandchild whose parent died in the life of the intestate was held to have capacity to inherit its parent's share: *Kyle v. Kyle*, 18 Ind. 108; *Scott v. Silvers*, 64 Id. 76. These decisions were justified by the court in which they were made, on the ground that the statutes of descent of the state, taken as a whole, evinced a legislative intent that grandchildren should inherit in the contingency in question.

The better rule is, that the words "child" or "children" do not include grandchildren, unless there is some expression in the statute demonstrating that the words were employed to designate all descendants of an intestate. The statute of Texas regulating the descent of community property provided that it should all go to the survivor if the deceased have no child or children; but if the deceased have a child or children, one half should pass to such child or children. A deceased spouse having left a grandchild, but no surviving children, the question arose whether such grandchild was entitled to any part of the community assets, and it was held that he was not. "It is a general rule of the common law," said the court, "that the words 'child' or 'children' do not, in their natural and proper signification, include a grandchild or grandchildren, or descendants in a more remote degree. This rule is subject to some exceptions in the cases of wills and other conveyances, when it was apparent that it was intended to give the expression a more extended signification. These exceptions are generally, and perhaps universally, confined to cases where it is necessary to so hold in order to give effect to the words of an instrument, or the evident intent of the party executing it": *Burgess v. Hargrove*, 64 Tex. 112; citing *Crook v. Whitley*, 7 De Gex, M. & G. 490; *Willis v. Jenkins*, 30 Ga. 167; *McGuire v. Westmoreland*, 36 Ala. 594; *Adams v. Law*, 17 How. 417; *Winsor v. Odd Fellows Ass'n*, 13 R. I. 149. To the same effect is *Estate of Curry*, 39 Cal. 529. The statute construed in that case gives, in a specified contingency, a portion of an estate "to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation." The decedent had left a sister, the children of two deceased sisters, and the grandchildren of another deceased sister. These latter were held not to be comprehended within the term "children of a deceased sister," as employed in the statute.

Children Omitted from Will. — In some instances, children are entitled to inherit, though their ancestor has made a will in which they have not been mentioned. If a child is born subsequently to the execution of a will, it will be entitled to participate in the estate of its ancestor to the same extent as

if such will had never been made, though he live sufficiently long after its execution to have revoked it if he had so desired: *Ward v. Ward*, 120 Ill. 111. This result may be avoided by employing language in the will from which it clearly appears that the testator intended it to operate against subsequently born issue as well as against those in being when it was made. So, though children be living at the execution of a will, they will generally share in their ancestor's estate, unless his omission to provide for them in the will appears to have been intentional: Stimson's American Statute Law, sec. 2842; Cal. Civ. Code, sec. 1307; *Estate of Wardell*, 57 Cal. 484. What language or circumstances are sufficient to indicate such intentional omission, and what evidence may be received for the purpose ascertaining the testator's actual intention, are matters upon which there is a considerable divergence of opinion, and which are the subject of a note to the case of *Wilson v. Fosket*, 39 Am. Dec. 740-744; see also *Bowen v. Hoxie*, 137 Mass. 527. The statute upon this subject in the state of Massachusetts provides, in effect, that a child omitted from the provisions of its ancestor's will shall take the same share of his estate, both real and personal, that it would have been entitled to had he died intestate, "unless it shall have been provided for by the testator in his lifetime, or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." Under this statute, the question has arisen whether a child might inherit, notwithstanding a provision in its parent's will, sufficient to exclude it from the inheritance, when it appears that the omission to provide for it in the will was occasioned by a mistake of law or of fact influencing the parent at the time the will was executed. The result was, that the supreme judicial court of the state determined that if it sufficiently appeared that the omission of the child from the will was intentional, his disinheritance could not be avoided by evidence tending to show the existence of such mistake. The words "mistake" and "accident," said the court, "are not to be construed as meaning such mistakes or accidents as would or might have caused the testator to entertain a different intention from that which the omission from the will would show, but mistake or accident in the expression of the will, or in its transcription. It was not intended to state two contingencies in which the omission from the will would operate to deprive the child of his share, — namely, where the omission was intentional, and also where, but for a mistake or accident, the testator would not have done that which he intended to do, and actually did, — but one only. The force of the word "accident" is not materially added to by the word "mistake," which must refer to errors such as are liable accidentally to occur in the preparation of a will, and not errors as to matters outside of the will. To set aside a will which actually expresses that which the testator intended, because he acted under erroneous views of the law as applicable to his children and his or their property, is to give a significance to the word 'mistake' which the history of the legislation, the language used therein, and the reason of the matter alike show was never contemplated. If the action of a testator is thus to be reviewed when it can be proved to the satisfaction of a court or jury that he acted under a mistake of law, it must equally be open to revision when they can be satisfied that he acted under a mistake of fact. If, therefore, he has intentionally excluded one son because he thought him a spendthrift or a profligate, or another because he thought him wealthy, and thus not in need of his bounty, and these shall appear upon a trial to have been errors, the children will, upon the theory, receive their proportionate shares of the estate from which the testator had excluded them. The answer to an inquiry as

to what a testator would have done had certain facts, or the law upon certain facts, appeared otherwise than as they did to him, and as they appear afterwards to a jury, is too speculative and problematical to afford a safe ground of action. If a court and jury acted under better information as to facts, or under wiser views of the law than the testator possessed, it would without doubt be within the power of the legislature to provide that they might cause the will to be set aside, so far as the effect of the intentional omission of a child was concerned; but it certainly would do so in very clear terms, as such legislation would materially interfere with the right which testators have heretofore had to exercise their own judgment as to all matters connected with the final disposition of their property": *Hurley v. O'Sullivan*, 137 Mass. 86.

Posthumous Children. — The effect of a will on the interest of posthumous children in the estate of their ancestor is the same as upon children born subsequently to its execution: *Buchanan's Estate*, 8 Cal. 507; *In re Huiell*, 6 Demarest, 352. For the purposes of inheritance, a posthumous child is, in contemplation of law, in existence from the moment of its conception. If its ancestor dies before its death, its share of the inheritance nevertheless vests in it at the moment of such death, and cannot be divested by any proceeding to which it is not a party: *Botsford v. O'Connor*, 57 Ill. 72; *Detrick v. Migatt*, 19 Id. 146; 68 Am. Dec. 584; *McConnell v. Smith*, 39 Ill. 279; *Stimson's American Statute Law*, sec. 2844; *Sansberry v. McElroy*, 6 Bush, 440; Cal. Civ. Code, sec. 1403; *Bishop v. Hampton*, 11 Ala. 254; *Harper v. Archer*, 4 Smedes & M. 99; 43 Am. Dec. 472, and note; *Swift v. Duffield*, 5 Serg. & R. 38; *Catholic Mut. Ben. Ass'n v. Firnane*, 50 Mich. 82. If partition is made of property sold in ignorance of the conception of such child, its interest cannot be affected thereby, and the property may be reclaimed from the possession of an innocent purchaser thereof in good faith and for valuable consideration: *Pearson v. Carlton*, 18 S. C. 47; *Detrick v. Migatt*, 19 Ill. 146; 68 Am. Dec. 584; *Botsford v. O'Connor*, 57 Ill. 72; *Massie v. Hiatt*, 82 Ky. 314. The right of posthumous children to an inheritance is in Tennessee dependent on their birth within ten months after the death of their ancestor: *Melton v. Davidson*, 86 Tenn. 129; but this may be more properly deemed a limitation in avoidance of fraud and the interposition of spurious heirs than a denial of the interest of posthumous children in the estate of their ancestor. Posthumous relatives other than children of an intestate are treated as in being in his lifetime, and therefore cannot inherit any interest in his estate: *Shriver v. State*, 65 Md. 278.

A posthumous child may be excluded from an inheritance by appropriate words in a will; this result, however, will not be accomplished by a devise and bequest of all a testator's property to his wife or to another person: *Chicago etc. R. R. Co. v. Wasserman*, 22 Fed. Rep. 872. If, on the other hand, a will is so drawn that a posthumous child is provided for in a certain contingency which may or may not happen, the intention to exclude it from the inheritance in the event of the non-happening of the contingency sufficiently appears. Hence if a wife devises and bequeathes all her property to her husband and his heirs and assigns, and then declares that in case her husband does not survive her, and she shall die leaving a child or children, that then she devises and bequeathes all such property to them, her posthumous child is excluded from all participation in her estate if her husband survives her: *Osborn v. Jefferson Bank*, 116 Ill. 130.

In the three cases hereinbefore referred to, of posthumous children, children born in the lifetime of the testator but after he has executed his will,

and children born before the execution of the will but omitted therefrom without such omission appearing to be intentional, it is doubtful whether the will can affect them to any extent whatever, unless it be to the extent of selecting an executor. As to them the testator, for most, if not for all, purposes, dies intestate. If he has by his will conferred on his executor power to sell his estate, or any portion thereof, without seeking the authority of any court, this authority cannot be so pursued as to divest their title; and if pursued at all, must be limited in its consequences to the other heirs against whom the will is operative: *Smith v. Robertson*, 89 N. Y. 556; *Northup v. Marquam*, 16 Or. 173; *Smith v. Olmstead*, Sup. Ct. Cal., January, 1890.

Adopted Children. — When a child has been adopted in the mode sanctioned by the laws of the state in which the intended adoption takes place, three questions connected with the law of inheritance arise: 1. What rights has the adopted child gained in the family into which it has been adopted? 2. What rights, if any, has it lost as a member of the family of its natural parents? 3. In the event of its death unmarried and without issue, which of the families is entitled to succeed to its estate? The first question is readily answered. The adopted child becomes entitled to succeed to the estate of its adopting parents to the same extent, and subject to the same contingencies and limitations, as if it were their natural child: *Lathrop v. Young*, 25 Ohio St. 451; *Barnes v. Allen*, 25 Ind. 222; *Schafer v. Eneu*, 54 Pa. St. 304; *Isenhour v. Isenhour*, 52 Ind. 328. If the law permits adoption by a husband without the assent of his wife, the child so adopted becomes the heir of the husband alone, and it sustains no relation to and is not heir of the wife: *Barnhizer v. Ferrell*, 47 Ind. 335. If an adopted child dies before its adopting parents, its children succeed to its share in the estate in the same manner as if it had been a natural child: *Pace v. Klink*, 51 Ga. 220; *contra*, *Sunderland's Estate*, 60 Iowa, 732. Whether an adopting child becomes a brother or sister of the natural children of the adopting parents, and entitled to inherit from them as such, is a question which has not been much considered, and regarding which the decisions are inharmonious; but their tendency is to deny the right of an adopted child to inherit from any other member of the adopting family other than from the adopting parents: *Keegan v. Gerahty*, 101 Ill. 26; *Sunderland's Estate*, 60 Iowa, 732; *Shelton v. Wright*, 25 Ga. 636; *Pace v. Klink*, 51 Id. 220; *Barnhizer v. Ferrell*, 47 Ind. 335. There are some purposes for which an adoption cannot be permitted to operate. Thus if property has been devised to a woman for life, and upon her death is directed to be conveyed to her children and the heirs of her children forever, an adopted child is not within the meaning of this devise, and after the devise is made it is not within the power of the legislature to confer upon a child subsequently adopted the right to take an interest under this law: *Schafer v. Eneu*, 54 Pa. St. 304. On becoming entitled to inherit from its adopting parents, an adopted child does not, in a majority of the states, lose its right to inherit from its natural parents. In other words, it may be and is the heir of both sets of parents: *Wagner v. Varner*, 50 Iowa, 532. While an adopted child is heir both to its natural and to its adopting parents, both are not heirs of it. Upon its death unmarried and without descendants, its estate, in the absence of statutes to the contrary, vests in its natural, to the exclusion of its adopting, parents: *Lathrop v. Young*, 25 Ohio St. 451; *Hole v. Robbins*, 53 Wis. 514; *Upson v. Noble*, 35 Ohio St. 655; although such estate may have been derived from the latter: *Reinders v. Koppelman*, 63 Mo. 482; *Barnhizer v. Ferrell*, *supra*.

The extraterritorial effect of the adoption of a child is a question which

has not yet been sufficiently discussed to be finally determined. On one hand, there is a line of authorities which seems to sustain the view that the child, on being adopted, obtains a *status* at the place of its domicile, and that the *status* thus obtained will be everywhere recognized: *Smith v. Kelly*, 23 Miss. 167; 55 Am. Dec. 87; *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321; *Scott v. Key*, 11 La. Ann. 232. If the state in which the adoption has taken place, and the state into which the adopting child and its adopting parents afterwards remove, have laws upon the subject of adoption which are substantially identical, so that it cannot be claimed that the settled policy of one state would be contravened by recognizing the law of the other, the better opinion is that the adopted child will be entitled to the same right of inheritance in the state into which it has been taken as it possessed in the state wherein it was adopted: *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321. If, on the other hand, the state in which the claim of the adopted child is urged has no statute upon the subject of adoption, or a statute essentially dissimilar from that of the state in which the adoption took place, the law of the adopting state will not be allowed to prevail, nor will the adopted child be conceded any right of inheritance not given it by the law of the state in which the inheritance is claimed: *Smith v. Derr's Adm'r*, 34 Pa. St. 126; 75 Am. Dec. 641; *Doe v. Vardill*, 5 Barn. & C. 434; 6 Bing. N. C. 385; *Barnum v. Barnum*, 42 Md. 241; *Singen v. Singen*, 45 Ala. 410.

ILLEGITIMATE CHILDREN. — The situation of illegitimate children at the common law was so unfortunate that it very properly indulged the presumption of legitimacy in all cases, unless such presumption was in conflict with clearly established facts. In the absence of positive evidence to the contrary, every child is presumed to be legitimate; and this is the case, though the date of his mother's marriage is shown, and there are circumstances from which it appears probable his birth occurred at a prior date: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and note; *Strode v. Magowan's Heirs*, 2 Bush, 64; *Caujolle v. Ferris*, 23 N. Y. 91; *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644; *State v. McDowell*, 101 N. C. 754. If a marriage takes place while a woman is known to her husband to be pregnant, this is equivalent to a public acknowledgment by him that the child is his, and irrevocably establishes its paternity and legitimacy: *Bailey v. Boyd*, 59 Ind. 292; *Baker v. Baker*, 13 Cal. 87. Generally, every child born during wedlock is presumed to be legitimate, and nothing less than evidence excluding the possibility of its legitimacy will remove this presumption: Note to *Weatherford v. Weatherford*, 56 Am. Dec. 210-223. Though a child is conceded to have been born out of wedlock, it will, in many of the states, be legitimized by the subsequent marriage of its parents, and thereby enabled to inherit to the same extent as their children born after their marriage: *Jackson v. Moore*, 8 Dana, 215; *Miller v. Miller*, 91 N. Y. 315; Cal. Civ. Code, sec. 215; *Houston v. Davidson*, 45 Ga. 574. If the parents have been formally married, and such marriage is void because they are incapacitated to contract it, or for any other reason, the issue thereof is illegitimate by the rules of the common law; but if the marriage is voidable only, and requires something to be done to avoid it, the issue thereof is legitimate: *Sneed v. Ewing*, 5 J. J. Marsh. 469; 22 Am. Dec. 41. In Ohio, the statute declares that "the issue of marriages deemed null in law shall nevertheless be legitimate." Under this statute, the innocent children of a marriage *de facto* are legitimate, though their guilty parent was married at the time he contracted the marriage of which they are the issue: *Wright v. Love*, 12

Ohio St. 619. Similar statutes have been enacted in other states: *Dyer v. Brannock*, 66 Mo. 391.

If the illegitimacy of a child be conceded, or established by sufficient and competent evidence, then, by the common law, it is not the kindred of any person, and can acquire and transmit no rights of inheritance, except such as may result from its own marriage. It did not inherit from its own mother, nor she from it; nor from its father, though the paternity was conceded; nor from the other children of the same mother, nor they from it: *Decker v. Hughes*, 38 Me. 153; *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159; *McCormick v. Cantrell*, 7 Yerg. 615; note to *Simmons v. Bull*, 56 Am. Dec. 261; *Bent v. St. Vrain*, 30 Mo. 268. None but the legitimate descendants or the surviving husband or wife could inherit from an illegitimate decedent: *Cooley v. Dewey*, 5 Pick. 93; *Barwick v. Miller*, 4 Desaus. Eq. 434, 442; *Jones v. Burden*, 4 Id. 439, 442. In the event of an illegitimate leaving no issue, his or her surviving husband or wife may become entitled to the whole of the estate: *Brooks v. Francis*, 3 McAr. 109; *Southgate v. Annon*, 31 Md. 113; *Hawkins v. Jones*, 19 Ohio St. 22. The word "child," or "children," when used in statute regarding the descent or inheritance of property, must always be interpreted as excluding illegitimate offspring: *Blacklaws v. Milne*, 82 Ill. 505; 25 Am. Rep. 339; note to *Simmons v. Bull*, 56 Am. Dec. 265.

The power of illegitimates to inherit and to transmit inheritances has been very much enlarged by American statutes. They have been constituted heirs of their mother in New York, New Jersey, and North Carolina, in default of lawful issue; and in nearly if not quite all of the other states, they inherit with the legitimate children, share and share alike: Stimson's American Statute Law, sec. 3151; *Kray v. Davis*, 87 Ind. 509; *Guire v. Brown*, 41 Iowa, 650; *Alexander v. Alexander*, 31 Ala. 241; *Stover v. Boswell*, 3 Dana, 233; *Black v. Cartmell*, 10 B. Mon. 188; *Opdyke's Appeal*, 49 Pa. St. 373; *Estate of Magee*, 63 Cal. 414; note to *Simmons v. Bull*, 56 Am. Dec. 263; although omitted from her will, unless it appears therefrom that the omission was intentional: *Wardell's Estate*, 57 Cal. 484. In the majority of the states, the mother of an illegitimate child inherits from it, if it dies unmarried, and without issue: Stimson's American Statute Law, sec. 3154; *Neil's Appeal*, 92 Pa. St. 193. In Rhode Island, Pennsylvania, Ohio, Indiana, Illinois, Virginia, West Virginia, Missouri, Arkansas, Texas, Mississippi, Florida, and New Mexico, illegitimates not only inherit from their mother, but represent her so as to inherit from her kin, share and share alike, with legitimate children. In Maine, Wisconsin, Minnesota, Nebraska, North Carolina, Kentucky, California, Oregon, Nevada, Washington, Dakota, Idaho, Montana, Louisiana, Arizona, and Michigan, illegitimates do not represent their mother so as to claim any estate from her kindred, whether lineal or collateral: Stimson's American Statute Law, sec. 3151.

The right of an illegitimate child to inherit from other children of the same mother, and them from it, may arise either when all of the children are illegitimate, or when some of them are illegitimate and others not. A tendency is manifest in some of the states to restrict the operation of statutes giving to illegitimates rights of inheritance to inheritances by them from their mother or by her from them: *Steckel's Appeal*, 64 Pa. St. 493; *Jackson v. Jackson*, 78 Ky. 390; 39 Am. Rep. 246; *Curtis v. Hewens*, 11 Met. 294. Where this is the case, the right of an illegitimate to inherit from his brothers and sisters is denied: *Pratt v. Atwood*, 108 Mass. 40; *Waltemate's Appeal*, 86 Pa. St. 219; *Haraden v. Larrabee*, 113 Mass. 430; *Scoggins v. Barnes*, 8 Baxt

560; *Doe v. Bates*, 6 Blackf. 533; *Allen v. Ramsey*, 1 Met. (Ky.) 185; *Burlington v. Fosby*, 6 Vt. 83; *Bacon v. McBride*, 32 Id. 585; *Remington v. Lewis*, 8 B. Mon. 606; *Woodward v. Duncan*, 1 Cold. 562. In a still greater number of states the capacity of one illegitimate child to inherit from another is sustained: *Powers v. Kite*, 83 N. C. 156; *Rogers v. Weller*, 5 Bism. 166; note to *Simmons v. Bull*, 56 Am. Dec. 264; *Miller v. Williams*, 66 Ill. 91; *Briggs v. Green*, 10 R. I. 495; *Houston v. Davidson*, 45 Ga. 574; *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 553; *Webb v. Webb*, 3 Head, 68; *Brown v. Dye*, 2 Root, 280; *Riley v. Byrd*, 3 Head, 20. If an illegitimate has brothers and sisters who are legitimate, or if some of them are legitimate and others are not, his estate may descend to all equally: *Ellis v. Hatfield*, 20 Ind. 102; *McBryde v. Patterson*, 78 N. C. 412.

The extraterritorial effect of the legitimizing of a child, like that of an adoption, is not finally settled. The better opinion is, we think, that when an illegitimate child has been made legitimate in any mode sanctioned by the laws of the state or country in which it and its parents at the time reside, its status of legitimacy becomes thereupon established, and entitles it everywhere to inherit as the legitimate offspring of such parents: *Miller v. Miller*, 91 N. Y. 315; 43 Am. Rep. 669; *Smith v. Kelly's Heirs*, 23 Miss. 170; 55 Am. Dec. 87; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Scott v. Key*, 11 La. Ann. 232; *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321; *contra*, *Smith v. Derr*, 34 Pa. St. 126; 75 Am. Dec. 641; *Birtchistle v. Vardill*, 2 Clark & F. 581; 7 Id. 895; 9 Bligh, 7; *Lingen v. Lingen*, 45 Ala. 410.

Minors Dying Unmarried and without Issue. — In many of the states special provision has been made for the descent of estates which have been inherited by children who, subsequently to such inheritance, die without attaining their majority or marrying. The general tendency of these statutes is to treat such estates as though they had never descended to such minors. Thus in Connecticut, if the minor decedent left no parents, nor brothers nor sisters, nor any descendant of a brother or sister, the statute declares "that such estate shall be distributed to and among the next of kin of the intestate of the blood of the person from whom such estate came or descended in equal portions, and if there be no such kindred, then to be distributed to the next of kin equally: *Austin v. Wight*, 38 Conn. 405. If the decedent left brothers and sisters, his share of the estate goes to such of them as are children of the ancestor from whom it came, whether of the whole or the half blood of the decedent: *North's Estate*, 48 Id. 583. In other words, the inheritance is regarded as coming, not from the deceased child, but from the father or other parent from whom the child inherited, and is divided among the surviving brothers and sisters, or their issue, as though the child had died in the lifetime of its ancestor; and this is the general prevailing rule: *Burke v. Burke*, 34 Mich. 451; *Nash v. Cutler*, 16 Pick. 406; *Perkins v. Simonds*, 28 Wis. 90; *Wiesner v. Zawn*, 39 Id. 188; Cal. Civ. Code, sec. 1386, subd. 7. If, however, under the provisions of these statutes a child acquires property by reason of the death of his minor brother or sister, and subsequently dies, the moiety which it thus acquires is not controlled by the statute, and may descend to its heirs other than its brothers and sisters: *Goodrich v. Adams*, 138 Mass. 552. In Maine, the statute upon this subject provides that "when a minor dies unmarried, leaving property inherited from either of his parents, it descends to the other children of the same parent and the issue of the deceased in equal shares, if they are of the same degree of kindred, otherwise according to the right of representation."

Under this statute, if a deceased minor left no parent, brother, nor sister, nor the issue of any deceased brother or sister, his property, though inherited from his father, descends to his next of kin, whether related to his father or not. His maternal grandmother, therefore, succeeds to his estate in preference to his paternal aunts: *Decoster v. Wing*, 76 Me. 450; or if his maternal and paternal grandparents are all surviving, they take equal moieties: *Albee v. Voss*, 76 Id. 448.

Grandchildren. — If there are no children surviving the intestate, his grandchildren, as we have before shown, take all the estate which would have descended to his children had any survived him: *Brown v. Taylor*, 62 Ind. 295; *Scott v. Silvers*, 64 Id. 76. If his descendants consist solely of grandchildren, his estate will be divided among them, but if they consist of grandchildren and the descendants of deceased grandchildren, then such estate descends to the grandchildren and to the issue of the deceased grandchildren, *per stirpes*, to the remotest degree: *Stimson's American Statute Law*, sec. 3103; *Crump v. Fancett*, 70 N. C. 354; *Cox v. Cox*, 44 Ind. 368.

Parents of Decedent. — The canon of the common law that an estate could never lineally ascend is believed to prevail in none of the United States other than New Jersey, in which state an estate may ascend to a decedent's parents, but not to his grandparents, nor to any ancestor more remote than his parents. If the decedent leaves no children nor descendants of children, his estate is generally given to one or both of his parents should they survive him, or is sometimes shared partly by his parents and partly by his other relatives. In New Hampshire, Maine, Vermont, Rhode Island, New York, Minnesota, Nebraska, Virginia, West Virginia, Arkansas, Oregon, Nevada, Colorado, Idaho, Montana, Florida, and Arizona, the estate of a child dying without descendants, and without any surviving husband or wife, is inherited by his father: *Stimson's American Statute Law*, sec. 3107; *Harbison v. Swan*, 58 Mo. 147; *Case v. Wildbridge*, 4 Ind. 51; *Harring v. Coles*, 2 Bradf. 349; *Morris v. Ward*, 36 N. Y. 587; *Gardiner v. Collins*, 2 Pet. 58; while in Massachusetts, Michigan, Wisconsin, Iowa, Kansas, Kentucky, Texas, California, Washington, Utah, and New Mexico, such inheritance is divided equally between the father and mother; and in Illinois, Missouri, Wyoming, and South Carolina, the parents, brothers, and sisters of the decedent, and the descendants of the latter, inherit his estate *per stirpes*: *Stimson's American Statute Law*, sec. 3107; *Noland v. Johnson*, 5 J. J. Marsh. 351; *McKenney v. Stewart*, 5 Kan. 384; and if but one parent survives, he or she is entitled to the share of both in Illinois: *Hayes v. Thomas*, 1 Breese, 136. In Pennsylvania the father and mother of the survivor of them take the estate for their joint lives only. In Utah the mother is the sole heir. Both parents take one half as joint tenants in Indiana, Texas, and Louisiana, the other half going to their brother and sisters and other descendants. In Arkansas, the father, and if he be dead, the mother, takes a life estate only, the remainder going to the brothers and sisters: *Kountz v. Davis*, 34 Ark. 590; *Magnus v. Arnold*, 31 Ark. 103. Both parents are excluded in favor of brothers and sisters in Connecticut, New Jersey, Ohio, Maryland, Delaware, Tennessee, Alabama, and Mississippi. All the personal estate vests in the mother in Arkansas, if the decedent left no father, wife, nor descendants: *Kelly v. McGuire*, 15 Ark. 555; *Oliver v. Vance*, 34 Id. 564.

Even at the common law a father or mother might inherit the estate of a deceased child as his next of kin, as where he was their cousin: *Eastwood v. Vintz*, 2 P. Wms. 613. In this country a parent may inherit as the next of kin, where the canon of the common law has been abolished forbidding the

lineal ascent of an estate, though there is no other relationship between the deceased and the parent than that of parent and child. Hence a mother inherits the estate of her child, though not especially named in the statute of descent and distribution, when she is the next of kin, and no person is living to whom the statute gives precedence over her: *Macomb v. Miller*, 9 Paige, 265; 26 Wend. 229; *Owen v. Oogbill*, 4 Hen. & M. 487; *Loftis v. Glass*, 15 Ark. 680; *McCullough v. Lee*, 7 Ohio, pt. 1, p. 15. In Massachusetts, Pennsylvania, Indiana, Michigan, Wisconsin, Iowa, Kansas, Kentucky, California, Washington, Utah, and New Mexico, if the decedent's mother is dead, all the estate given to the father and mother goes to the father. In Texas, if the father or mother is dead, the share to which he or she was entitled vests in the brothers and sisters, and if there are no brothers and sisters, then in the father, if he be surviving. In Massachusetts, Pennsylvania, Indiana, Wisconsin, Iowa, Kansas, Arkansas, California, Colorado, Washington, Utah, and New Mexico, if the father is not living, his share goes to the mother; while in New Hampshire, Maine, Vermont, Rhode Island, Nebraska, Virginia, West Virginia, Texas, Oregon, Nevada, Dakota, Idaho, Montana, Florida, and Arizona, the father's share, if he be not surviving, vests in the mother, brothers, and sisters, and children of deceased brothers and sisters; and in Michigan and Kentucky, one half goes to the brothers and sisters: *Stimson's American Statute Law*, sec. 3111. In those states where brothers and sisters are preferred to the parents, if there happen to be no brothers or sisters, nor descendants of brothers or sisters, the share of such brothers and sisters goes to the father in New Jersey, Ohio, Maryland, Delaware, North Carolina, South Carolina, Georgia, and Alabama; and if no father, then to the mother in Ohio, Tennessee, Mississippi, and Louisiana; and to the father and mother, and the survivor of them, in Pennsylvania, Indiana, and Mississippi; to the mother in South Carolina, Georgia, and Alabama, if there be no father: *Stimson's American Statute Law*, sec. 3117.

Brothers and Sisters.— Sometimes the brothers and sisters of a decedent are given preference to his parents as heirs of his estate, and sometimes his estate descends partly to the parents and partly to the brothers and sisters, and to the descendants of deceased brothers and sisters, as we have already shown in treating of the rights of parents. If, however, both parents of the decedent are dead, then in nearly all, if not in all, of the states, the brothers and sisters are next in the order of succession, and if any of them are dead, their children represent them, and take their share: *Stimson's American Statute Law*, sec. 3113; *Estate of Castro v. Barry*, 18 Cal. 96; *Wilsay v. Sawyer*, 1 Murph. 493; *Barnitz v. Casey*, 7 Cranch, 456; *Harris v. Hayes*, 6 Binn. 422; *McCombe v. Dillo*, 5 Serg. & R. 304; *Riley v. Byrd*, 3 Head, 20. In California, as decided in the principal case, if the husband survives, and the children of a deceased brother or sister, but no brother nor sister, the child of the deceased brother or sister does not represent and take the share of its parent as against such husband. He takes the whole.

If a Decedent Leaves No Parent, Husband, Wife, Child, Brother, nor Sister, nor the Descendants of Any Deceased Child, Brother, or Sister, his "estate goes to his next of kin, according to the civil law, in equal degree, except that when there are two or more in the same degree," those claiming through the nearest ancestor are preferred in Massachusetts, Maine, Pennsylvania, Wisconsin, Minnesota, Nebraska, Delaware, California, Oregon, Nevada, Washington, Dakota, Idaho, Montana, Utah, Alabama, and Arizona; and to the next of kin in New Hampshire, Vermont, Illinois, Mississippi, and Louisiana.

As we have shown, if the decedent left neither parent, child, husband, wife, brother, nor sister, nor the descendants of any deceased child, brother, or sister, the statutes of many of the states do not undertake to specify who shall inherit his estate, further than to declare that his next of kin shall succeed. In Rhode Island, Virginia, West Virginia, and Florida, the inheritance is divided, and one half goes to the paternal and one half to the maternal kindred, "in the following order, viz.: 1. To the grandfather; 2. To the grandmother and the uncles and aunts on the same side, and their descendants, if deceased, in equal shares, *per stirpes*; 3. To the great-grandfathers or great-grandfather, if but one; 4. To the great-grandmothers or great-grandmother, and brothers and sisters of grandfathers and grandmothers, and the descendants of such of them as are deceased, in equal shares, *per stirpes*; 5. And so on, passing to nearest lineal male ancestors, and for want of them, to nearest lineal female ancestors in the same degree, and descendants of such male and female ancestors; 6. If no such maternal kindred or paternal kindred, both halves go the paternal or maternal kindred respectively; 7. If no such kindred, to the husband or wife; if the husband or wife be dead, to his or her kindred, as if such husband or wife had survived the intestate, and died entitled to the estate": Stimson's American Statute Law, sec. 3121.

Some further specifications are made in certain states, and are thus epitomized by Mr. Stimson in section 3121 of his compilation of American Statute Law: "To the brothers and sisters of the half-blood, and their issue; if none, to the next of kin in equal degree, — in Connecticut, Pennsylvania, New Jersey, and Ohio; to the grandfathers, grandmothers, uncles, and aunts of the deceased, and their descendants, if deceased, *per stirpes*; and so on, passing to the nearest lineal ancestors and their descendants, if deceased, *per stirpes*, — in Missouri, Arkansas, Colorado, and Wyoming; to the brothers and sisters both of the father and mother of the intestate and their issue in equal shares, in the same manner as if they had been brothers and sisters of the intestate; if none, it descends according to the common law, — in New York; but in two states, if the parents are dead, the estate descends as if they had outlived the intestate, and died seised, and so on through ascending ancestors, — Iowa and Kansas; in Indiana, one half to the paternal kin, one half to the maternal kin, viz.: 1. To the grandfather and grandmother equally; if one be dead, the entire one half to the survivor; if both are dead, 2. To uncles and aunts and their descendants *per stirpes*; 3. To the next of kin in equal degree of consanguinity among the paternal kin; if no kin at all on one side, all to the other side; in Maryland, if no father nor mother, to the paternal grandfather, if none such, to his descendants in equal degree equally, if none such, to the maternal grandfather, if none such, to his descendants, and so on, alternating the next male paternal ancestor and his descendants, and the next maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants; to the grandfather and grandmother equally; if either be dead, all of such moiety to the survivor; if none, to the uncles and aunts and their descendants; if none, to the great-grandparents and their descendants; and so on to the nearest lineal ancestors and their descendants in the same way; and if no such kindred to one of the parents, the whole goes to the kindred of the other, — in Kentucky; in Tennessee, if father, mother, brothers and sisters, and their descendants are dead, in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, to the deceased; if those heirs, or those whom they represent, are not of equal degree, heirs nearest in blood

are preferred; first, to the brothers and sisters and their descendants, of the father; next, to those of the mother, — in Arkansas; in Texas, one half to paternal kin, and one half to maternal kin, viz.: 1. To grandfather and grandmother equally; if either is dead, one half to the survivor and one half to the descendants of the grandfather or grandmother deceased; if none such, all to the surviving grandfather or grandmother; if no grandfather or grandmother, the whole to descendants; and so on, passing in line male to the nearest lineal ancestors and their descendants; to the "lineal ancestor"; if none, to the next of kin, but in this case, if there be a widow or husband, she takes two thirds, — in South Carolina; to the first cousins, uncles, and aunts in equal shares; and in default of these, to the next of kin, — in Georgia; to the nearest relations up to the eighth degree, without any preference being given to those having a double tie of relationship, — in New Mexico."

Next of Kin, Who are. — In speaking of kin or kindred, kinship by consanguinity is meant, unless the language of the statute clearly shows that kindred by affinity are included. In Ohio, the wife is designated, for certain purposes, as her husband's next of kin: *Gardner v. Gardner*, 13 Ohio St. 426; but in the absence of statutes like that in force in Ohio, a surviving husband or wife cannot inherit as the next of kin nor as a descendant of the decedent: *Prather v. Prather*, 58 Ind. 141. Which of the decedent's kindred is his next of kin is to be determined by a computation made according to the rules either of the common or of the civil law. The mode of computing kindred sanctioned by the civil law has been adopted, either by statute or by courts, in Massachusetts, Maine, Vermont, Connecticut, Pennsylvania, Illinois, Indiana, Michigan, Iowa, Wisconsin, Minnesota, New York, Nebraska, Delaware, Ohio, Oregon, Nevada, Washington, Idaho, South Carolina, Alabama, Mississippi, Louisiana, New Mexico, Arizona, and New Jersey: *Ryan v. Andrews*, 21 Mich. 229; *Stimson's American Statute Law*, sec. 3139; *Cloud v. Bruce*, 61 Ind. 171; *Clayton v. Drake*, 17 Ohio St. 367; *Sweeney v. Willis*, 1 Bradf. 495; *Smith v. Gains*, 36 N. J. Eq. 297; *Schenck v. Vail*, 24 N. J. L. 538; *Taylor v. Bray*, 32 Id. 182; *Hurtin v. Proal*, 3 Bradf. 414. Probably the rule of the common law on this subject does not remain in force in any of the states excepting Maryland, North Carolina, and Georgia: *Stimson's American Statute Law*, sec. 3139; *Wetter v. Habersham*, 60 Ga. 199. Under both systems, each generation which is counted is called a degree, but the common law counted only the generations between the common ancestor and the person who was most remote from him, while the civil law added together the generations between both persons in question and the common ancestor. "By the canon and common law, which concur in this respect, the degrees of kindred between two persons are reckoned by counting from a common ancestor to the most remote descendant of the two from him. The relation of two brothers is in the first degree, because there is but one step from their father to either of them. But the relation of uncle and nephew is in the second degree, there being two degrees from the nephew to his grandfather, the father of the uncle. By the civil law, which is, in this respect, generally adopted in this country, these degrees are computed by adding together the number of degrees that are between each of the two persons whose relationship is to be ascertained and the common ancestor. Thus the relation between brothers is in the second degree, each being one degree removed from the father; but between uncle and nephew it is the third, and between cousins, the fourth, degree of kindred": 3 Washburn on Real Property, 10. The statutory statement upon the same subject in California is found in section 1393 of the Civil

Code, as follows: "In the collateral line, the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on."

As the statutes provide especially who shall inherit when the decedent left either descendants, father, mother, brother, or sister, in speaking of the next of kin we must hereafter be understood as referring to a decedent who has left no descendants, nor father, mother, brother, nor sister. The next in the line of succession must be the decedent's grandparents. Indeed, computing by the rule of the civil law, his grandparents and his brothers and sisters are related in the same degree, to wit, the second, for from the decedent to his parents is one degree, and from their parents to them also one degree, and the relationship of grandparents to grandchild is therefore in the second degree. By express statutory provisions in all the states, brothers and sisters are, however, given precedence over grandparents, though they are related to the intestate in the same degree. Unless some statute declares otherwise, grandparents come next after brothers and sisters, and take precedence over uncles and aunts: *Power v. Dougherty*, 83 Ky. 187; *Decoster v. Wing*, 76 Me. 450; *Martindale v. Kendrick*, 4 G. Greene, 307; *Philips v. Peter*, 35 Ala. 696; *Barger v. Hobbs*, 67 Ill. 592; *Kelsey v. Hardy*, 20 N. H. 479; *McDonnell v. Addams*, 45 Pa. St. 430; *In re Afflick*, 3 McAr. 95; and great-grandparents have like precedence over great-uncles and aunts: *O'loud v. Bruce*, 61 Ind. 171.

Next in the order of succession are decedent's uncles and aunts, his nephews and nieces, and his great-grandparents; for all are related to him in the third degree. From the great-grandparents to the decedent's parents are two degrees, and from the decedent to his parents one, making three degrees; while, computing by the civil law, the decedent's grandfather being regarded as the common ancestor, from the decedent to him are two degrees, and from the aunts or uncles to him is one degree. So from decedent's nephew to the latter's father is one degree, and thence to decedent's father another degree, and from the latter to decedent one more degree, — again making in all three degrees. Hence uncles and aunts and nephews and nieces are related to the decedent in the third degree, and if there are no grandparents surviving, come next after brothers and sisters, who are related to decedent in the second degree. Therefore uncles or aunts, either as next of kin, or because especially designated in the statute, come next after the brothers and sisters in the line of succession, and inherit in preference to more distant kindred: *Stannard v. Case*, 40 Ohio St. 211; *Levering v. Heighe*, 2 Md. Ch. 81; *DeLong v. Walker*, 9 Port. 497; *Walker v. Smith*, 3 Yeates, 571; *Page v. Parker*, 61 N. H. 65. Generally, however, nephews and nieces, by right of representation, gain precedence over other kindred of the same degree of relationship to the intestate; for this right is universally conceded to the children of deceased brothers and sisters. In other words, the children of a deceased brother or sister are entitled to the share to which he or she would be entitled if still surviving: *Davis v. Rowe*, 6 Rand. 355. This right of representation has been alluded to in treating of the rights of children's children, and will be further considered at page 111 of this note.

The fourth degree of relationship includes first-cousins, great-uncles and aunts, and great-great-grandparents. Hence a great-uncle and a first-cousin,

being related in the same degree to the intestate, succeed to his land in equal moieties: *Smith v. Gaines*, 35 N. J. Eq. 65. The great-great-uncles and aunts, the children of a cousin, and the children of a great-uncle or aunt of an intestate are related to him in the fifth degree, while the relationship of children of second-cousins is in the sixth degree. Uncles and aunts take before and to the exclusion of cousins: *Taylor v. Bray*, 32 N. J. L. 182. "Those nearest in blood to the person last seized, if capable of inheriting, shall take the inheritance." Hence decedent's first-cousins, who are children of the brother of her father from whom the estate came to her by descent inherit in preference to persons who are her second-cousins by consanguinity, and her uncles and aunts by affinity: *Speer v. Miller*, 37 N. J. Eq. 492. It seems entirely superfluous to go on with these illustrations, for every possible case is determined readily by adding together the number of generations between the person in question and the common ancestor of himself and the decedent and between the decedent and such ancestor.

Ancestral Estate. — When an intestate has left an estate which he acquired by gift, devise, or descent from some of his ancestors, and he has no descendants, there is an apparent injustice in permitting it to descend to any one not related by the tie of consanguinity to him or her from whom it came. Hence, in determining the descent of such estate, all the kindred of decedent must be omitted from consideration who are not also kindred of the ancestor from whom the estate was derived: *Bezard v. Mosely*, 30 Ark. 517; *Brown v. Hunt*, 18 Ohio St. 311; *Ramsey v. Ramsey*, 7 Ind. 607; *Johnson v. Lybrook*, 16 Id. 473; *Shippen v. Isard*, 1 Serg. & R. 222; *Danner v. Shissler*, 31 Pa. St. 289; *Montgomery v. Petriken*, 29 Id. 118; *Robert's Appeal*, 39 Id. 417; *McWilliams v. Ross*, 46 Id. 369; *Moffit v. Clark*, 6 Watts & S. 258; *Bevan v. Taylor*, 7 Serg. & R. 397; *Hawkins v. Shewen*, 1 Sim. & St. 257; 1 L. J. Ch. 148; *Wheeler v. Clutterback*, 52 N. Y. 67; *Beard v. Mosely*, 30 Ark. 517; *Kountz v. Davis*, 34 Id. 590; *Kelly v. McGuire*, 15 Id. 555. In other words, an ancestral estate can be inherited only by persons of the ancestral blood: *Campbell v. Ware*, 27 Id. 65. Therefore, if a daughter inherits real estate from her mother, and then dies without issue, it descends to her sister, to the exclusion of her father, because he is not related by consanguinity to the mother: *Tillinghast v. Coggeshall*, 7 R. L. 383; *Churchill v. Reamer*, 8 Bush, 256. If a husband and wife each own an undivided interest in lands, the heirs of each succeed to their ancestor's share: *Breese v. Walker*, 59 Vt. 370. If one dies seized of real estate inherited from his father, and leaving no issue, parent, brother, nor sister, nor issue of any deceased child, brother, or sister, the estate vests in the heirs of the father: *Beaumont v. Irwin*, 2 Sneed, 291. In Maine, if a minor dies unmarried, his estate which he has inherited from one of his parents, in the event of his leaving no brother nor sister, nor any issue of any deceased brother or sister, is not treated as ancestral estate, but descends to his next of kin in equal degree, whether or not of the blood of the parent from whom the inheritance came: *Decoster v. Wing*, 76 Me. 450; *Albee v. Vose*, 76 Id. 448.

Various questions arise as to whether property in question is or is not ancestral estate within the meaning of the laws of succession. In Michigan the source whence personal property is derived will not be considered: *Henderson v. Sherman*, 47 Mich. 267. If moneys received by a child as a gift from its parents, or as the proceeds of its share of its parents' estate, are invested in lands, such lands will not be considered as coming to it on the part of its parents whence such moneys came, but will descend in the same manner

as if the moneys had been earned by such child: *Champlin v. Baldwin*, 1 Paige, 562; *Simpson v. Hall*, 4 Serg. & R. 337. If there are several heirs who are entitled to an estate as tenants in common, and they partition such estate among themselves, the part set off to each to hold in severalty retains the character of ancestral estate, and will descend as such: *Conklin v. Brown*, 8 Abb. Pr., N. S., 345; 57 Barb. 265. If a deed from a parent to a child purports to be in consideration of love and affection and one dollar, the technical consideration will be disregarded, and the estate will descend as one acquired by gift: *Morris v. Ward*, 36 N. Y. 587. An estate which an intestate received by descent or devise from his ancestor may have been acquired by the latter from his ancestor, and then the question arising is, Must the kindred who inherit be of the blood of both or only of the last ancestor? The better opinion is, that the last or "immediate ancestor, donor, or deviser is the sole stock of descent," and therefore that the kindred entitled to inherit need be of his blood only: *Clark v. Shalier*, 46 Conn. 119; *Buckingham v. Jacques*, 37 Id. 402; *Gardner v. Collins*, 2 Pet. 98; *Curran v. Taylor*, 19 Ohio, 36; *Prickett's Lessee v. Parker*, 3 Ohio St. 394; *Oliver v. Vance*, 34 Ark. 564; *Wheeler v. Clutterback*, 52 N. Y. 67; *Valentine v. Wetherill*, 31 Barb. 655; *Emanuel v. Ebnis*, 48 N. Y. Sup. Ct. 430; *White v. White*, 19 Ohio St. 531. This is contrary to the fifth canon of the common law, one of the rules of which was, that, "in the absence of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, and the first purchaser was he who has acquired the title for his family, whether the same was acquired by sale or by gift or by any other method, except that of descent. This rule prevails in a few of the states." In those states, "he who is to inherit an estate which descended to the intestate must be also related to him from whom it descended": *Lewis v. Gorman*, 5 Pa. St. 164; *Moffitt v. Clark*, 6 Watts & S. 258; and as between several claimants he must be preferred who is nearest in blood to the perquisitor: *Ranck's Appeal*, 113 Pa. St. 98.

The two persons contesting for an estate which had descended to the intestate may both be of the blood of the ancestor from whom it came, and he who is nearest in blood to the ancestor may be the most remote from the intestate. In such a case the construction of the statute adopted in New Jersey is, that he who is nearest in blood to the intestate shall inherit if he is also of the blood of the ancestor, though he may not be nearest in virtue of the blood of such ancestor to the person last seised: *Miller v. Spear*, 33 N. J. Eq. 567; *Delaplain v. Jones*, 8 N. J. L. 340.

Kindred of the Half-blood. — The right of relatives of the half-blood to inherit both at the common law and under the American statutes is quite fully considered in note to *Prescott v. Carr*, 61 Am. Dec. 655-657, and will therefore be but briefly noticed here. The general tendency of modern legislation is in favor of the half-blood. Thus in Massachusetts, Maryland, Illinois, Kansas, Delaware, North Carolina, Oregon, and Washington, the half-blood rule is abolished for all cases and in all purposes, and there is no distinction as to the descent of real or personal estate between children or kin of the half-blood: Stimson's American Statute Law, sec. 3133; *Gardner v. Collins*, 3 Mass. 393; 2 Pet. 58; *Doe v. Sheppard*, 3 Murph. 333; *Prichard v. Turner*, 2 Hawks, 435; *Ross v. Toms*, 2 Id. 9; *Sheffield v. Lovering*, 12 Mass. 490; *McKenney v. Mellon*, 3 Houst. 277; *Larrabee v. Tucker*, 116 Mass. 562. This is true of personal property in New York, Pennsylvania, and Maryland. In Virginia, West Virginia, Kentucky, Missouri, Texas, Colo-

rado, Wyoming, Florida, and Louisiana, "collaterals of the half-blood inherit only one half as much as those of the half-blood"; and in Connecticut and Massachusetts, "kindred of the half-blood take real or personal property next after kindred of the whole blood of the same degree": Stimson's American Statute Law, sec. 3133; *Petty v. Maller*, 15 B. Mon. 951; *Talbot v. Talbot*, 17 Id. 1.

Generally, the exclusion of the half-blood is carried so far only as may be necessary to prevent them from inheriting an estate which their intestate acquired by descent from an ancestor to whom they bear no relationship by consanguinity: Stimson's American Statute Law, sec. 3133 e; *Van Sickle v. Gibson*, 40 Mich. 170; *Armington v. Armington*, 23 Ind. 74; *Clark v. Sprague*, 5 Blackf. 412; *Ryan v. Andrews*, 21 Mich. 229; *Perkins v. Simonds*, 28 Wis. 90; *In re Southworth*, 6 Demarest, 216; *Lowe v. Macubbin*, 1 Har. & J. 550; *Den v. Urison*, 2 N. J. L. 212; *Den v. De Hart*, 3 Id. 481; *Den v. Jones*, 8 Id. 340; *Prichett v. Kirkman*, 2 Tenn. Ch. 390; *Eastman v. Eastman*, 83 Ala. 478; *McCracken v. Rogers*, 6 Miss. 278; *Brown v. Burlingham*, 5 Sand. 418. In Mississippi, if an intestate dies leaving no descendants, husband, wife, nor brother nor sister of the whole blood, those of the half-blood inherit his estate (*Featheres v. Featheres*, 1 Walk. Ch. 311), unless there are children of deceased brothers of the whole blood, in which event such children take by right of representation to the exclusion of the brothers and sisters of the half-blood: *Hulme v. Montgomery*, 31 Miss. 105; *Scott v. Terry*, 37 Id. 65.

Relatives of the half-blood are preferred to more remote relatives of the whole blood. Therefore a half-brother of an intestate succeeds to his property to the exclusion of his maternal aunt or uncle, though it descended from his mother: *Chaney v. Baker*, 59 Tenn. 424; *Rowley v. Stray*, 32 Mich. 70; *Clay v. Cassins*, 1 T. B. Mon. 75. If lands have descended to an intestate, his brothers and sisters of the half-blood, who are also of the blood of the ancestor from whom the land descended, are entitled to inherit equally with those of the whole blood: *Beebe v. Griffing*, 14 N. Y. 235.

In Indiana, the statute declares that kindred of the half-blood shall inherit equally with those of the whole blood, but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit, provided that on failure of such kindred other kindred of the half-blood shall inherit as if they were of the whole blood; and this statute has been interpreted as if it read as follows: "Kindred of the half-blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those kindred of the half-blood only who are of the blood of the ancestor shall inherit, provided that on the failure of such kindred of the half-blood being the blood of such ancestor, other kindred of the half-blood shall inherit as if they were of the whole blood": *Pond v. Irwin*, 113 Ind. 243.

When property is set aside to a widow, pursuant to a statute entitling her to have it set aside to her as a homestead, she acquires it, "not by inheritance by an ancestor, but by statutory right. The statute carves it out of the estate of the husband, and devolves title on her." When she thereafter dies, such property is treated as if she had acquired it by purchase, and her children by a subsequent marriage are entitled to inherit from her to the same extent as the children of her former husband: *Eastman v. Eastman*, 83 Ala. 478.

Representation. — Persons who are not next of kin to an intestate frequently inherit his estate, to the exclusion of less remote kindred, through the opera-

tion of the fourth canon of descent hereinbefore quoted, to the effect that the descendants of a decedent shall inherit *per stirpes* an estate which such person would have inherited had he survived the intestate. In the cases to which this canon is applicable, the computation must be with reference to the deceased person who would have inherited the estate had he lived. As long as there are any descendants of the intestate, the right of representation exists; and the term "descendants" includes children, grandchildren, and their children to the remotest degree: *Jewell v. Jewell*, 28 Cal. 232; *Armstrong v. Moran*, 1 Bradf. 314; *Price v. Strange*, 6 Madd. 161; 3 Bro. C. C. 226. When we come to collateral relatives to the decedent, the right of representation is conceded to a limited extent only, and the statutes upon the subject are conflicting. The common law, as we understand it, restricted the right of representation among collateral kindred to the children of deceased brothers and sisters: *Quimby v. Higgins*, 14 Me. 309; *Hannan v. Osborn*, 4 Paige, 336; *Ades v. Campbell*, 79 N. Y. 52; *Carter v. Crasley*, T. Ryan, 496; Schouler on Executors and Administrators, sec. 502; *Powers v. Littlewood*, 1 P. Wms. 595. This is still the rule as to descent of personal property in New York, New Jersey, and Tennessee, and as to both real and personal estate in Pennsylvania, Maryland, South Carolina, Georgia, Massachusetts, and New Hampshire: Stimson's American Statute Law, sec. 3138; *Levering v. Heighe*, 2 Md. Ch. 81; *Ellicott v. Ellicott*, 2 Id. 468; *McComas v. Amos*, 29 Md. 120; *Hatch v. Hatch*, 21 Vt. 450; *Perot's Appeal*, 102 Pa. St. 235; *Conant v. Kent*, 130 Mass. 178; *Bigelow v. Morong*, 103 Id. 287; *Snow v. Snow*, 111 Id. 389; *Page v. Parker*, 61 N. H. 65. In Maine, if a decedent leaves a brother or sister, or a child or children of a deceased brother or sister, the latter take by right of representation: *Matter of Reynolds*, 57 Me. 350; *Doane v. Freeman*, 45 Id. 113. If he leave no brother nor sister, and does leave children of a deceased brother or sister, and also grandchildren of a deceased brother or sister, the latter are not entitled to anything by right of representation: *Davis v. Stinson*, 53 Id. 493. In Vermont, Connecticut, New Jersey, Illinois, Alabama, Mississippi, and Missouri, the right of representation among collaterals is extended to the descendants of brothers and sisters of the decedent: *Fidler v. Higgins*, 21 N. J. Eq. 188; *Copenhaver v. Copenhaver*, 78 Mo. 55; 9 Mo. App. 200. The right of representation seems not to be restricted, but to extend to the descendants of collateral relatives generally in Rhode Island, Kansas, Delaware, North Carolina, Kentucky, and Florida: Stimson's American Statute Law, sec. 3138. In Pennsylvania, the right was extended, by statute enacted in 1855, to the grandchildren of brothers and sisters and the children of uncles and aunts: *Hays's Appeal*, 89 Pa. St. 256.

Where the doctrine of representation is applicable, part of those entitled to succeed to the estate of an intestate must take *per stirpes*, and hence some heirs may receive a greater portion than others equally near him in blood. Thus if he left surviving him a son A and a child of a deceased son B, and two children of another deceased son C, the inheritance must be divided into three equal portions, one of which must be given to A, another to the child of B, and the third to the children of C; hence each of the decedent's grandchildren by C take only one sixth of his estate, while his grandchild by B, though no nearer in blood to the decedent, takes one third of his estate. Where, however, all the heirs of an intestate are related to him in the same degree, they are not allowed to take *per stirpes* as the representatives of their respective parents, but the estate is divided equally among them *per capita*: *Blake v. Blake*, 85 Ind. 65; *Nichols v. Shepard*, 63 N. H. 391; Schouler on Executors and Administrators, sec. 498; *Snow v. Snow*, 111 Mass. 389; *Jack*

son v. Thurman, 6 Johns. 322. "Where the right of representation does prevail, as among descendants, if they are all in the same degree of kindred, as all grandchildren, or all great grandchildren, they take in equal shares, though they would be very equal if they took *per stirpes* and by right of representation. The rule of representation applies only from necessity, or where there are lineal heirs in different degrees, as children, and the children of deceased child, or brothers and sisters, and the children of a deceased brother or sister": *Knapp v. Windsor*, 6 Cush. 162.

[IN BANK.]

CHOPE v. CITY OF EUREKA.

[78 CALIFORNIA, 588.]

MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR PERSONAL INJURIES TO INDIVIDUALS RESULTING FROM THE NEGLIGENCE of its officers, as where they leave open a sewer, without proper guards or lights, on a dark night, into which plaintiff fell, to his great injury.

S. M. Buck, for the appellant.

John A. McQuaid, for the respondent.

McFARLAND, J. This is an action to recover damages for alleged personal injuries, caused by the plaintiff falling into an excavation for a sewer within the corporate limits of defendant, a municipal corporation. A general demurrer to the complaint was overruled; a motion for nonsuit was denied; and the jury found a verdict for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The defendant was incorporated by a special charter in 1874: Stats. 1873-74, p. 91. Its legislative body is a common council consisting of five members. The charter also provides for a marshal and certain other officers. The common council is given the powers enumerated in section 4408 of the Political Code, and also certain other special powers; but it is nowhere provided that the corporation shall be liable for injuries suffered by individuals through the neglect of the officers of the corporation to properly perform their duties. The facts upon which the judgment rests are these:—

The records of the proceedings of the common council, introduced in evidence, show the following, and no more: "In regard to certain alley-way nuisances, more particularly that of the sewer leading down the alley from the Western Hotel, and forming a cesspool at the end of said alley-way, the mat-

ter was, on motion, left in the hands of the committee on streets, they to take prompt action thereon."

After this, the city marshal, for the purpose of removing said cesspool nuisance, commenced the construction of a sewer; and the jury had, perhaps, the right to find, from the evidence, that, in doing so, he acted under the direction of one or more members of said committee on streets. The sewer, while in process of construction, was left open, with a twelve-inch plank across it, and without the protection of guards or lights. On a dark night, the plaintiff fell into the sewer and was hurt. And for the damages thus received he recovered the judgment.

Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this state that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other states; although it is to be observed that in the New England and some other states there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted; and if any change in the law is desirable, that change must be made by the legislature. And so far, at least, the legislature has shown no disposition to make the change: *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. City of Sacramento*, 61 Id. 275; *Barnett v. Contra Costa County*, 67 Id. 77; *Crowell v. Sonoma County*, 25 Id. 315; *Hoffman v. San Joaquin County*, 21 Id. 430. The nonsuit, therefore, should have been granted; and the verdict and judgment were against the law and the evidence.

Judgment and order reversed, and cause remanded.

MUNICIPAL CORPORATIONS — DUTY AS TO STREETS. — A city owes the duty to those who use its streets of keeping such streets safe for travel; and it is bound to exercise ordinary care in keeping its streets reasonably safe: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note; *City of Atlanta v. Buchanan*, 76 Ga. 585; *Kinney v. City of Troy*, 108 N. Y. 567; *Fowler v. Town of Strawberry Hill*, 74 Iowa, 644; *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186; *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691, and note 697; *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164, and note 169; *Burrell Township v. Uncapher*, 117 Pa. St. 353; 2 Am. St. Rep. 664, and note; *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594, and note; note to *McCarthy v. Portland*, 24 Am. Rep. 25,

26; *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827, and note 831; *Clark v. City of Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32; *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note 459. But in the absence of a statute to that effect, a city or municipality is not liable in a civil action for an injury resulting from negligence of the city authorities to keep its streets in repair and safe for travel: *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and note 35; because at common law no civil action lies against a municipality for personal injuries sustained by reason of a defect in a street: *Barry v. City of Lowell*, 8 Allen, 127; 85 Am. Dec. 690, and note; *White v. Commissioners*, 90 N. C. 437; 47 Am. Rep. 534; *Brabham v. Supervisors*, 54 Miss. 363; 28 Am. Rep. 352; *Wood v. County of Tipton*, 7 Baxt. 112; 32 Am. Rep. 561; *White v. County of Bond*, 58 Ill. 297; 11 Am. Rep. 65; *Town of Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652; *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450. Yet even in the absence of statute, it was held in Iowa that a city was responsible for its neglect to keep its streets in repair, when proceeded against in a civil action for damages for injuries sustained: *Manderschid v. Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196; see also Dillon on Municipal Corporations, 3d ed., sec. 1024; and the cases cited in the dissenting opinion of the principal case by Works, J.

[IN BANK.]

WHITE v. LEE.

[78 CALIFORNIA, 593.]

MINING CLAIM. — FAILURE TO DISTINCTLY MARK THE LOCATION OF A MINING CLAIM so that its boundaries can be readily traced invalidates the claim.

THE BOUNDARY OF A MINING CLAIM MUST BE DISTINCTLY MARKED AT THE TIME OF ITS LOCATION, although the claim is for a whole legal subdivision and the public surveys have been extended over the land.

ACTION to determine conflicting titles to a mining claim. The attempted location under which the defendants claim was prior to that of the plaintiffs' grantors, but the locators under whom defendants acquired their title did not attempt to mark the boundaries of their claim upon the ground. That part of the notice of location posted upon the ground which described the property located was as follows: "All of the southwest quarter of the northwest quarter, section 22, township 11 north, range 7 east, Mount Diablo base and meridian, in Pine Grove mining district, Placer County, California." The notice contained no reference to the marks of the public surveys, nor did the evidence at the trial show how the section corners were marked at the time of their establishment, or whether such marks, if any were made, continued at the date of the location in question. The locator did not know where

the boundaries of the land described were, except that he knew that it was bounded on the south by the Hoadley placer mine. The trial court gave judgment for the defendants. Plaintiffs appealed.

Hale and Craig, and William Singer, Jr., for the appellants.

F. P. Tuttle, for the respondents.

HAYNE, C. Action to determine the right to a mining claim. Judgment for defendants. Plaintiffs appeal.

In 1886 the grantors of the plaintiffs located the land, marked off the boundaries, and did all the other acts required of them by law, and therefore they acquired a valid claim if there was no prior right in the grantors of the defendants. The latter posted and recorded notice of location, but failed to mark off the boundaries. The statute requires that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced": R. S., sec. 2324. And it is well settled that a failure to comply with this requirement invalidates the claim. It is contended for the respondents, however, that the requirement does not apply where the public surveys have been extended over the land, and the claim is for the whole of a legal subdivision; and this is the only question to be determined. The learned counsel for the respondents expressly says: "The one point to be passed upon by the court in this case is, whether in locating a placer mining claim by legal subdivisions on surveyed ground it is necessary to mark the lines of the location." The position is, that this exception to the general requirement follows from other provisions of the Revised Statutes. But we do not think that this position can be maintained.

Section 2329 provides, among other things, that "where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivision of the public lands."

This, however, simply provides where the claimant shall run the lines of his claim. It does not at all dispense with the requirement as to how the lines shall be marked or evidenced.

Section 2331 provides that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required," etc.

This provision does not refer to the marking by the claimant of the boundaries of his claim upon the ground, but to the

plat and survey which are to be filed upon the application for the patent. Nor do we see any provision which dispenses with the general requirement that the boundaries shall be marked.

The construction contended for does not seem to us to be in harmony with the general purpose of the act. The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter-section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such as would be sufficient in a deed. For the information of these men, it is required that the boundaries shall be "distinctly marked upon the ground." The section lines may not have been "distinctly" marked upon the ground, or the marks may have become obliterated by time or accident. And to say that the mere reference to the legal subdivision is of itself sufficient would, in our opinion, defeat the purpose of the requirement.

We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

MINES AND MINING. — As to locating, staking, recording certificate of, and surveying mineral lands, see *Omar v. Soper*, 11 Col. 380; 7 Am. St. Rep. 246, and note 254. Compare extended note to *McClintock v. Bryden*, 63 Am. Dec. 91-110, for the general law applicable to mines and their location; see also *Gregory v. Pershbaker*, 73 Cal. 109.

[IN BANK.]

SWAIN v. STOCKTON SAVINGS ETC. SOCIETY.

[78 CALIFORNIA, 600.]

PURCHASER AT AN EXECUTION SALE HAS, BEFORE THE TIME FOR REDEMPTION EXPIRES, an interest in the property in the nature of a lien thereon, and is therefore entitled to the rights and remedies of a lien-holder.

SUBROGATION. — PURCHASER AT AN EXECUTION SALE, though the time in which redemption can be made has not expired, is entitled to be subrogated to a trust deed existing at the time of the sale upon paying to the holder thereof the amount due from the defendant in the execution.

PLAINTIFF, in November, 1886, purchased at execution sale the interest of Cornwall and wife in a tract of land, and received a certificate of purchase therefor. In December, 1884, Cornwall and wife, as parties of the first part, conveyed the same land to L. U. Shippee and F. M. West, as parties of the second part, in trust, to secure a promissory note made by Cornwall and wife to the Stockton Savings and Loan Society, a corporation, named in such deed as party of the third part. Upon receiving his certificate of purchase, plaintiff tendered to the corporation the amount due it from Cornwall and wife and demanded to be subrogated to all the benefits and liens of the corporation under its trust deed, but it, while it expressed its readiness to receive the money, declined, in the event of such receipt, to do anything but reconvey the land to Cornwall and wife. Plaintiff then deposited the money in the name of the corporation in a bank of good repute, giving written notice of such deposit, and brought this action to be subrogated to all the benefits of the corporation under the deed of trust, and to compel the delivery to him of the deed and the evidence of indebtedness secured thereby. Plaintiff relied upon section 2904 of the Civil Code, declaring that "one who has a lien inferior to another upon the same property has a right,—1. To redeem the property in the same manner as its owner might from a superior lien; 2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests upon satisfying the claim secured." Plaintiff recovered judgment as prayed for in his complaint, and the defendant appealed.

W. L. Dudley, for the appellant.

J. H. Budd, August Muentner, and W. B. Nutter, for the respondent.

FOOTE, C. This action was brought under section 2904 of the Civil Code, to subrogate the plaintiff to certain superior lien rights of the defendant. The defendant demurred to the complaint, which was overruled. Upon answer filed, a trial was had, and a judgment as prayed for passed for the plaintiff, from which the defendant appeals.

1. It is contended by the appellant that the complaint does not state facts sufficient to constitute a cause of action.

2. That there is a non-joinder of parties defendant.

3. That the findings do not support the judgment.

a. The first point made by the defendant as to the insufficiency of the complaint rests upon the assumption that the plaintiff has no lien which would entitle him to subrogation under the section of the Civil Code, *supra*.

The argument is made that after a sale of real property under a judgment to the plaintiff, a judgment creditor, but before the deed is made by the sheriff, and before the time of redemption has passed, the judgment creditor who has purchased at the sale has no lien; that it ceased when the sale was made.

This is fallacious, and is in opposition to the plainly expressed views of the appellate court in *People v. Mayhew*, 26 Cal. 661, where it is said: "If the right or interest that the purchaser or redemptioner holds prior to the execution of the sheriff's deed is not a mere lien, and with the qualification only of a mere lien, we are unable to give it a legal designation. See *Vaughn v. Ely*, 4 Barb. 159, and cases there cited."

b. It was necessary to the protection of the plaintiff's interests that he should redeem the property he had purchased at sheriff's sale from a superior lien, and hold the lien himself, which the defendant held as a *cestui que trust*, under a trust deed in the nature of a mortgage, which secured a debt from the Cornwalls, who were also the judgment debtors of the plaintiff and other junior judgment creditors.

The plaintiff had become a mere lien-holder until the execution of the sheriff's deed should be had. The Cornwalls were insolvent; other junior judgment creditors had a right to redeem the property from the plaintiff, and he could not look to them to repay what he might pay to the defendant, unless he could make it evident that he had paid the superior lien debt of the former, and held the lien.

If the defendant, as it wished to do, was permitted (upon the plaintiff's paying to it its debt) to reconvey the property

to the mortgagors, the Cornwalls, *non constat* but what the junior judgment creditors, without further proof that the plaintiff had paid the debt to protect his lien, might claim that the mortgage debt was canceled, the property reverted in the Cornwalls, and that the plaintiff did not hold the superior lien given by the trust deed in the nature of a mortgage.

To prevent any such embarrassment, it was to the plaintiff's interest to be subrogated to the defendant's rights, and have satisfactory proof thereof.

c. What the plaintiff sought in this action was that he might be placed in the same situation as the defendant in relation to the trustees under the trust deed, and to the judgment debtors who were the mortgagors in that instrument.

This could only affect the defendant. It did not in any way impinge upon the rights of the trustees or the mortgagors, who were also judgment debtors of the plaintiff.

So far as the mortgagors are concerned, it could not fix the amount of their indebtedness; they could have been heard to resist the payment of a greater sum than they owed, under the trust deed, when an attempt should be made to execute the trust.

The trustees could act under the terms of the deed in trust, as well for one beneficiary as another. It could make no possible difference to them whether the plaintiff or defendant was their *cestui que trust*.

In so far as the subrogation prayed for was concerned if granted, it could not alter the relations of the parties any more than if the plaintiff had by agreement purchased the debt of the defendant, and had it and the lien securing it transferred to himself.

d. The finding complained of (as to what the defendant was willing to do, that is, to accept the payment of the money it claimed as due, under the deed in trust, and procure the trustees to deed the property back to the mortgagors, yet still refusing to subrogate the plaintiff) is entirely consistent with and supports the judgment.

Perceiving no prejudicial error, we advise that the judgment be affirmed.

HAYNE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

Rehearing denied.

EXECUTION SALE—RIGHTS OF PURCHASERS—SUBROGATION.—See note to *Valle's Heirs v. Fleming's Heirs*, 77 Am. Dec. 564. A bidder at a judicial sale acquires no rights until his proposition is accepted by the court: *Dula v. Seagle*, 98 N. C. 458.

[IN BANK.]

GRANDONA v. LOVDAL.

[78 CALIFORNIA, 611.]

NUISANCE.—MAINTENANCE OF GROWING TREES UPON A BOUNDARY LINE between plaintiff's and defendant's land cannot be enjoined as a nuisance, where the only damage shown to have resulted to plaintiff from such trees were: 1. That they might have interfered with the growing of fruit-trees had any been planted; 2. That they crowded over the fences on plaintiff's land at a place where it was the duty of defendant to repair them.

A. P. Catlin and Henry Starr, for the appellant.

Freeman and Bates, for the respondent.

BELCHER, C. C. This action was brought to abate a nuisance, and for damages. The case was tried by the court, and judgment given for defendant, from which, and from an order denying a new trial, plaintiff has appealed.

The plaintiff owns a tract of land in Sacramento County, containing about fifteen and one half acres, and the alleged nuisance is a line of cottonwood trees, standing about eight feet apart, along his southern boundary, for a distance of about 534 feet. The defendant owns the adjoining land, and the trees were planted by his grantor in 1865 from eight to twelve inches south of the dividing line.

The complaint alleges that the branches of the trees extend over and upon plaintiff's land, and shade the same, and thereby destroy the crops upon about an acre of his land; that the roots of the trees extend upon plaintiff's land for the distance of about thirty feet all along the line of the trees, so near the surface of the ground as to prevent him from plowing and cultivating the land; that the trees, and the branches and roots thereof, destroy the substance of plaintiff's land for a space of about sixty feet wide along the whole line of the trees, and so impoverish the same as to make it wholly unproductive; that the trunks of many of the trees have grown so that a large part of the trunks are extended over and upon plaintiff's land, and have crowded out and pushed down his

fences erected upon the dividing line. It is then further alleged that the plaintiff has suffered damages in the sum of five hundred dollars, by reason of the aforesaid wrongs and injuries; that the further continuance of the same will cause him irreparable damage, and that the trees are of no use or value to defendant, and are a permanent and irreparable injury to plaintiff.

The answer denies that the trees have destroyed, or will destroy, any portion of plaintiff's crops; that the roots of the trees, or any of them, extend into plaintiff's land farther than five or six feet at any point; that such roots prevent the plaintiff from plowing or cultivating any portion of his land; that the trees, or the branches or roots thereof, destroy the substance of any part of plaintiff's land, or impoverish such land, or any part thereof; that the trunks of the trees have crowded out or pushed down plaintiff's fence, or any part thereof; that the plaintiff has suffered any damage by reason of the trees, or any of them, or will suffer any damage by their continuance, or that the trees or any of them are an injury to plaintiff. And the answer alleges that the trees are useful and very desirable along the boundary line to mark such boundary, to fasten fences upon, and to anchor them in time of flood, and prevent their being swept away and lost; that the limbs of the trees are valuable and useful for fuel, and the trees are an ornament to both plaintiff's and defendant's lands, and enhance their beauty and value; that defendant has kept the tops of the trees trimmed to prevent their injuriously shading or otherwise injuring the adjacent lands; that plaintiff can now plow and cultivate as near his boundary as he could if only a common fence, instead of the trees, were along his boundary; and that all of such trees were standing and growing on or near said boundary line long prior to the purchase of their lands by either plaintiff or defendant, and that defendant has not planted or placed any trees in or near such line, and has done nothing to such trees or toward their maintenance other than to trim their tops to prevent their casting any large or injurious shade, and to fasten fences thereto, to maintain it in place, and prevent its removal by floods or other cause.

The court found upon the issues presented as follows:—

“That said trees described in the complaint have not destroyed any portion of plaintiff's crops. The roots thereof have not prevented plaintiff from plowing or cultivating any

portion of his lands, and plaintiff can now plow and cultivate as near his boundary line as he could if a common or ordinary fence, instead of such trees, were along such boundary. Plaintiff's lands have not been destroyed, nor has the substance of any part been destroyed or impoverished, by said trees, nor by the roots or branches thereof. That said trees have not pushed down plaintiff's fence, or any part thereof, though they have crowded the same over upon plaintiff's land a few inches in places where the bodies of the trees extend across the dividing line. The portion of the fence along such line near said trees has always been maintained by defendant and his grantor, they having, by an understanding with plaintiff, constructed and kept up that part of the fence, while the latter has maintained another portion of the line fence between plaintiff and defendant. In maintaining said fence in place during times of flood, the defendant has been very materially aided by such trees; and but for the use of said trees at such times as an anchorage, said fence would have floated away and been lost on at least two occasions when the levees between said lands and the Sacramento River broke, and permitted said lands to be swept by floods. That the limbs and tops of said trees have been cut off by defendant at intervals of about three years apart, for use as hop-poles and fuel, and to prevent them casting too great a shade. All of said trees, except eight or nine, were cut off about twenty feet from the ground, and trimmed, in the fall of 1885, and their limbs do not extend over plaintiff's line more than six or seven feet. The remaining eight or nine trees are by the side of defendant's barn and corral, and their shade is desirable for his stock. They are now about forty feet high, and their limbs overhang plaintiff's land about fifteen or twenty feet.

"That the defendant has not done any act with respect to said trees other than to cut and trim off their tops and branches, and to fasten fences to such trees in times of flood.

"That the plaintiff has not suffered any damage by reason of said trees, or any of them, nor will he suffer damage by their continuance, nor are they, or any of them, an injury to him."

The Code of Civil Procedure, section 731, defines an actionable nuisance as follows: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the

subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered."

In order to maintain his action, it was necessary, therefore, for the plaintiff to prove that the trees complained of constituted a nuisance within the definition above given. The court, as we have seen, found that the plaintiff's proofs were not sufficient, and the only question is, Were the findings justified by the evidence?

In the bill of exceptions found in the transcript the evidence is not set out, but it is stated that "there was a conflict of testimony as to whether either the shade or roots of the trees injured plaintiff's land, and as to whether said roots prevented plaintiff from plowing his lands as near said fence as he otherwise could, and as to whether either the shade or roots of said trees had an injurious effect upon the crops of alfalfa which plaintiff was in the habit of growing upon that part of the land where said line of trees partly shaded them."

It is also stated that it appeared from the evidence, without conflict, that plaintiff's land was rich and valuable, and was used for raising vegetables and alfalfa, and that the effect of the branches and shade would be injurious to the growing of fruit-trees upon that part of his land which was overhung by the branches and shaded by the trees. It is also stated that "the plaintiff had never planted any fruit-trees adjacent to the line of trees in controversy, nor anywhere near them," and it is not stated that he ever proposed or intended to do so.

It is urged for appellant that the trees were a nuisance, because they interfered with and prevented his enjoying the free and full use of his land for growing fruit-trees. But we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for.

The cases cited in support of this point do not sustain it. In *Meyer v. Metzler*, 51 Cal. 142, the court said: "It is found as a fact that the projection of the defendant's west wall prevents the plaintiff from raising and repairing his own building, which improvement it is also found that he is desirous of making." And it was held that this amounted to an obstruction of the free use of the plaintiff's property, and was therefore

a nuisance. In *Grandona v. Lovdal*, 70 Cal. 161, the complaint alleged direct and positive damage done to the plaintiff's land by the supposed nuisance, and the court held that it was not subject to a general demurrer.

In *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56, it was held that "one who maintained a vault so that with his knowledge filthy water habitually filters from it, whether above or below the surface of the ground, into land of a neighbor, where it injures a cellar and well, is liable in damages for the injury, without other proof of negligence."

In *Commonwealth v. Blaisdell*, 107 Mass. 234, it was simply held that steps projecting from a house into a highway so as to obstruct it are a nuisance at common law and under the statute of Massachusetts.

It is specified that the evidence was insufficient to justify the decision, because it appeared that the trunks had crowded the division fence over and upon plaintiff's land, and thereby ousted him from a part of his land. But the plaintiff had never been called upon to repair that part of the fence, and had never been prevented from plowing and cultivating his land as near the line as he could if the trees had not been there. His property was therefore not injuriously affected, nor his personal enjoyment lessened by the crowding. Besides, the trees and the overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off or trimmed them at his pleasure. This being so, we do not see how the fact that the trees had grown so that a small part of them was on plaintiff's land could give him any cause of action.

It is further specified that the decision was contrary to the evidence, for the reason that defendant maintained the trees for the purpose of supplying himself with fuel and hop-poles, and thereby using plaintiff's land for his own profit and advantage. But how can this maintain plaintiff's contention? The fuel and hop-poles growing over plaintiff's land were his, and could have been claimed by him as against the defendant. And the fact that the balance of the limbs and branches were useful to defendant in no way harmed the plaintiff or gave him cause for complaint.

We conclude that the judgment cannot be reversed on the ground that the decision was contrary to the evidence or the law; and as no errors of law are specified or relied upon, we advise that the judgment and order be affirmed.

FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, judgment and order are affirmed.

NUISANCES. — INJURIES TO ANOTHER'S PROPERTY through use of one's own property: See note to *Radcliff v. Mayor etc. of Brooklyn*, 53 Am. Dec. 368 et seq.; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Wabash & E. Co. v. Spears*, 16 Ind. 441; 79 Am. Dec. 444; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; note to *Haugh's Appeal*, 48 Id. 194-196.

TREES GROWING ON OR NEAR A BOUNDARY LINE. — This subject is discussed in *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326, and note 330, 331; *Hoffman v. Armstrong*, 48 N. Y. 203; 11 Am. Rep. 537.

[IN BANK.]

CHAMPION v. WOODS.

[79 CALIFORNIA, 17.]

DECEPTION AS TO MATTERS OF LAW GENERALLY AFFORDS NO GROUND FOR RELIEF, unless the transaction is between parties holding fiduciary or confidential relations, and one of them who has superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage over the other, who is ignorant, and has not been in a position to become informed.

IF THE MEANS OF KNOWLEDGE ARE AT HAND, AND EQUALLY AVAILABLE TO BOTH PARTIES, and the subject-matter is open to the inspection of both alike, and there are no fiduciary or confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party.

A WIFE IS NOT ENTITLED TO RELIEF FROM A DECREE OF DIVORCE OMITTING TO PROVIDE FOR HER PROPERTY RIGHTS, when she alleged in her complaint in the divorce suit that there was no common property, though she avers that she was caused to make such allegation by her reliance on the representation of her husband that he owned all the property which had been acquired by them during their marriage. It was inexcusable negligence on her part to rely on her husband's representations after their relations to each other became sufficiently hostile to occasion a suit for divorce, without making any effort to ascertain the law of the case from some other and less interested source.

RELIEF WILL NOT BE GRANTED FROM A JUDGMENT BROUGHT ABOUT BY THE CARELESSNESS of the injured party.

J. C. Black, for the appellant.

J. B. and Walter A. Lamar, for the respondent.

PATERSON, J. On February 4, 1886, the plaintiff herein commenced an action in the superior court of Santa Clara

County for a divorce. She alleged in her complaint that there was no common property. On February 18, 1886, a decree was entered therein, dissolving the bonds of matrimony then existing between the plaintiff and her husband, Henry B. Champion, but the court made no reference in its decree to the property.

This action was commenced May 16, 1888. Defendant is executor of the last will of Henry B. Champion.

The complaint alleges, in substance, that plaintiff and H. B. Champion intermarried in the state of Illinois, on the eighteenth day of August, 1873; that her husband was intelligent, and well knew what was common and what was separate property in this state; that plaintiff during all the time of her residence in this state up to January, 1888, was ignorant of what was common and what was separate property, and of the fact that there existed any common property by reason of the marriage relation; that she always loved her husband, wholly trusted him, looked to him for instruction, believed him honest, reposed unbounded confidence in his integrity; that she and her husband came to the county of Santa Clara in the year 1877, where both parties continued to reside until his death, which occurred August 2, 1887; that they ceased to live together as man and wife on the eleventh day of October, 1884, but in all business matters plaintiff retained full confidence in her husband's integrity, which confidence continued until his death; that in consequence of such confidence she wholly believed all he said concerning the property and property rights acquired by them after marriage; that her husband "systematically and persistently, and during all the time of their residence in California continuously, represented to plaintiff that the property he owned and had acquired since said marriage was his sole and separate property and estate, and that there was no community property of said marriage; that plaintiff had no interest therein; that all the property owned by him at the time of his death was acquired subsequent to the marriage, and is community property; that all of the representations aforesaid were false, and known by said deceased when made to be false, and they were made to plaintiff from time to time for the express purpose of causing her to believe the same, and she did believe them, to be true; that when she filed her complaint she was wholly ignorant of the facts, and fully believed the property was the separate property of her husband; that in consequence of said false state-

ments and confidence aforesaid, she caused to be inserted in the complaint an allegation that there was no common property; that the decree was entered February 18, 1886, but that the property rights of plaintiff were omitted from the decree wholly by reason of said false and fraudulent representations; that Henry B. died August 2, 1887, and left all the property to H. F. Woods, the defendant, as trustee, who has since been duly appointed executor of the last will and testament. The complaint then gives a description of the property claimed to be the community property, and concludes with a prayer for a decree canceling the decree in the divorce case so far as the same affects the property rights of plaintiff, for an adjudication that she is the owner of one half of the property described, and for an injunction restraining the defendant from delivering said one half to any other person than plaintiff, and for general relief.

The defendant had judgment in the court below, a general demurrer to the complaint having been sustained, and plaintiff having declined further to amend her complaint. The question before us on this appeal is, whether the complaint states facts sufficient to constitute a cause of action.

It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property,—misrepresentations of law. Generally speaking, deception as to matters of law affords no ground of redress or relief. There are exceptions,—the rule does not apply to transactions between parties holding fiduciary or confidential relations, and where one who has had superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage of another, who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief, as well as if the matters represented were matters of fact.

It is not sufficient under any circumstances that the party complaining was ignorant of the truth of the matter concerning which the representation was made, and that he believed it to be true. His situation may be such that he will be deemed in law to have knowledge of the facts, and barred from making complaint, though actually ignorant of the true state of fact. It is a general principle that if the means of knowledge be at hand, and equally available to both parties, and the subject-matter be open to inspection of both alike, and

there be no fiduciary or confidential relation, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party. The fraud must have been practiced under such circumstances as to leave a reasonable inference that the injured party was deceived, and if the circumstances attending the transaction are such as to put a reasonable person upon inquiry, there can be no presumption of deceit.

It seems quite incredible that the plaintiff, while engaged in a hostile action against her husband, could cherish such unbounded love and confidence in him as is set forth in the complaint. For a period of sixteen months before she commenced her action for a divorce she was unable to live with him. His conduct had been such — he had so far forgotten his marriage vows — that she not only could not live with him, but she demanded that the bonds existing between them should be severed. With the improbability of the truth of plaintiff's statements, however, we have little to do in determining whether the facts are sufficient on demurrer; but a stale demand under such circumstances does not commend itself to a court of equity. The plaintiff severed all connection with her husband on October 11, 1884. This action was not commenced until about three years and a half thereafter.

It is clear that the question of property was not overlooked in the divorce suit. There was inserted in the complaint an allegation "that there was no common property." It is not at all probable that the plaintiff drew her own complaint and conducted her own case. The general rule is, that the judgment of a court of competent jurisdiction, having jurisdiction of the subject and the parties, is conclusive upon the same parties in any other proceeding in law or in equity, unless reversed or set aside in some mode prescribed by law. Judgments may be attacked on the ground of fraud and misrepresentation, it is true, but relief will not be granted, unless the party seeking the same has been free from negligence. If the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom: *Quinn v. Wetherbee*, 41 Cal. 250. The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely upon him in a matter of so much importance as her property rights. Having determined that the

bonds of matrimony must be dissolved, the first thought which would naturally occur to a person of ordinary caution and care would relate to the children, if there were any, and to the property. Plaintiff's failure to obtain independent advice and information was inexcusable carelessness. Something must have been said to her attorney about the property when drawing the complaint. That was the time and the occasion for consultation with her legal adviser as to her property rights. A simple question propounded at that time would have led to a different result.

The fact alleged, "that her husband systematically and persistently, and during all the time of their residence in California continuously, represented, declared, and asserted to plaintiff that the property he owned and had since said marriage was his sole and separate acquired property," etc., was sufficient of itself to create suspicion in the mind of plaintiff as a prudent person, and when continued for several years after separation and divorce, to lead her to make some inquiry on the subject.

We agree with the court below that "the complaint fails to show any equities entitling the plaintiff to relief."

Judgment affirmed.

MISTAKE OF LAW. — Where parties understand the facts, any mistake as to law is not ordinarily a cause for the annulling of a contract: *Fisher v. May*, 2 Bibb, 448; 5 Am. Dec. 628; *Lawrence v. Beaubien*, 2 Bail. 623; 23 Am. Dec. 155, and note; *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189; *Storrs v. Barker*, 6 Johns. Ch. 166; 10 Am. Dec. 316, and note; *McKean v. Reed*, Lit. Sel. Cas. 395; 12 Am. Dec. 318; *Platt v. Scott*, 6 Blackf. 389; 39 Am. Dec. 436; *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; *State v. Reigart*, 1 Gill, 1; 39 Am. Dec. 628; *Good v. Herr*, 7 Watts & S. 253; 42 Am. Dec. 236; *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181; *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440; *McDaniel v. State*, 8 Smedes & M. 401; 70 Am. Dec. 406; *Emerson v. Navarro*, 31 Tex. 334; 98 Am. Dec. 534; *Rochester v. Alfred Bank*, 13 Wis. 432; 80 Am. Dec. 746; *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564; *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; *Black v. Ward*, 27 Mich. 191; 15 Am. Rep. 162, and note 171; *Town of L. v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *Burkhauser v. Schmitt*, 45 Wis. 816; 30 Am. Rep. 740; unless one party has a superior means of knowledge, or the parties are in some fiduciary relation towards one another, whereby undue influence can be presumed to have been exerted: *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Kenyon v. Welty*, 20 Cal. 637; 81 Am. Dec. 137; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Christy v. Sullivan*, 50 Cal. 337; 19 Am. Rep. 655, and note 656. But compare *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63, and note; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816, and note.

READ v. BUFFUM.

[79 CALIFORNIA, 77.]

AUTHORITY OF SECRETARY OF A CORPORATION TO MAKE AN ASSIGNMENT of indebtedness due to it will not be presumed; it must be proved.

RATIFICATION OF AN UNAUTHORIZED ASSIGNMENT OF A CAUSE OF ACTION made after suit is brought will not relate back to the date of such assignment, and thereby support the action.

PLEADING. — ANSWER WHICH ALLEGES that defendant "has no information or belief sufficient to enable him to answer the allegation set forth in paragraph 3 of said complaint, and for that reason he denies each and every and all of said allegations in said paragraph contained," is sufficient to put in issue an allegation in such paragraph that the cause of action sued upon had been assigned to the plaintiff.

THE form of denial considered in the opinion of the court is shown by the last clause in the *syllabus*.

George Lezinsky, Franklin P. Bull, and Frank, Eisner, and Platshek, for the appellants.

Pillsbury and Blanding, for the respondent.

SHARPSTEIN, J. The plaintiff sues as the assignee of the California Powder Works, a corporation, for money alleged to be due for goods, wares, and merchandise sold and delivered by said corporation to the defendant. The defendant in his answer denies the allegation of his indebtedness to said corporation, and denies the assignment of said alleged indebtedness to the plaintiff.

And as a further and separate answer, and as a defense to said action, alleges: —

"That at all the times stated in said amended complaint the defendant was, and is now, a resident of the territory of Arizona, and has not at any of said times been within the state of California; that defendant purchased, between the seventh day of April, 1882, and the twentieth day of May, 1883, at the territory of Arizona, certain goods, wares, and merchandise which are alleged in the said amended complaint to have been purchased by said defendant from the said California Powder Works at the city and county of San Francisco."

He further alleges that the action is barred by certain provisions of the laws of the territory of Arizona, and by the provisions of sections 361 and 339 of the Code of Civil Procedure of this state.

One Sol. Lewis filed a complaint in intervention, to which the plaintiff filed an answer.

Upon the issues raised by the pleadings, the parties pro-

ceeded to trial, and John F. Lohse was called and sworn as a witness for plaintiff. He testified that he was secretary and treasurer of the California Powder Works, and had been secretary since 1865, the commencement of the company.

Counsel for plaintiff then offered in evidence the following document:—

“BOARD OF TRADE OF SAN FRANCISCO.

**“In the Matter of W. M. Buffum & Co., Jerome, A. T.
Dated San Francisco, May 29, 1885.**

“In consideration of one dollar, and other good and valuable consideration to us severally paid by the assignee next hereinafter mentioned, the receipt whereof is hereby acknowledged, we hereby sell, assign, and transfer to John H. Read our claims and demands against the first above named, in the amounts hereinafter set forth, and we severally authorize said assignee to enforce the payment of the same by legal remedies or otherwise, for his use and benefit.

“Witness our hands, with the several amounts of said claims and demands placed opposite thereto:—

“The California Powder Works, per John F. Lohse, secretary, \$2,379.53.”

This was shown to the witness, who testified that the signature was his.

The defendant objected to the said evidence, on the ground that the said document purports to convey an account against W. M. Buffum & Co., whereas this action is an action against W. M. Buffum, and therefore does not prove the assignment of any amount against the defendant in this suit. The objection was overruled, and the defendant excepted.

Plaintiff's counsel then asked the witness if there was any action of the board of directors approving that assignment. Witness answered, “There was.” He was requested to read it, and read as follows:—

“Mr. Payton introduced the following resolution, namely ‘Resolved, that the assignment of this company on May 29 1885, by the secretary, under the direction of the president. to John H. Read, of the claims and demands of the company against William M. Buffum, doing business under the name of William M. Buffum & Co., be and the same is hereby approved, ratified, and confirmed.’ Said resolution, being seconded by Mr. Luning, was unanimously carried.”

Witness testified that he read from the records of the corporation, and that the claim referred to was the one in suit.

Plaintiff then offered in evidence the said document and resolution, to which the defendant objected, on the ground that said document purports to convey an account against W. M. Buffum & Co., whereas this is an action against W. M. Buffum, and therefore does not prove the assignment of any account against the defendant in this suit. The objection was overruled, and the defendant excepted. Witness then testified that the goods were sold in Arizona, or in San Francisco, and shipped from the latter place; that they were sold and shipped to defendant by order. Witness produced one of the orders, which he said was a sample of the others; that payments were made by checks sent from Arizona to the company here.

On cross-examination witness stated that he had charge of all the letters and orders of the company, and that everything was under his control. He further testified that all the goods were shipped direct from San Francisco by order of defendant.

Plaintiff here rested, and defendant moved for a nonsuit, on the ground: 1. That there had been no assignment to him proven by the plaintiff in this action of the claim of the California Powder Works, alleged in the complaint; 2. That it had not been proven by the plaintiff that the goods sued on in the complaint were sold to the defendant at the city of San Francisco. The motion was denied, and the defendant excepted.

Defendant then moved for a continuance of the trial, on the ground that he had not had an opportunity to prepare for the trial, and was therefore unable to produce any testimony. The motion was denied, and the defendant excepted.

Defendant offered no testimony, whereupon the court rendered its decision, and ordered judgment for plaintiff and against defendant, as prayed in plaintiff's complaint. Defendant moved for a new trial, which was denied, and the appeal is from the judgment, and the order denying the motion for a new trial.

In order to maintain his action, it was necessary for the plaintiff to allege an assignment to him by the California Powder Works of the claim sued on. And the denial of that allegation by the defendant cast the burden of proving it upon the plaintiff. This he attempted and failed to do. The secretary of the company, who executed the assignment on which plaintiff relies, is not shown to have had any power to make it. The ratification of the board of directors was not given until after the commencement of the action, — too late to avail the

plaintiff anything, as he could not recover for a cause of action accruing after he commenced his action.

We think the form of denial sufficient to raise an issue upon the allegation of the complaint as to the fact of assignment. It is a form authorized by the code, and we think this a case in which it might properly be employed. This, in our opinion, constitutes the only error disclosed by the record.

Judgment and order reversed.

CORPORATIONS. — Where there is a variance in the names of a corporation, it will not be presumed that the two names represent the identical corporation, but this fact must be averred and proved: *McGregor v. Fuller Implement Co.*, 72 Iowa, 143.

RATIFICATION OF AN UNAUTHORIZED ACT made during the pendency of an action does not relate back to the date of the act so ratified, for the purpose of sustaining a suit brought before such ratification: *Wittenbrock v. Bellmer*, 57 Cal. 12; note to *Persons v. McKibben*, 61 Am. Dec. 88.

CORPORATIONS — AUTHORITY OF OFFICERS. — The deed of a corporation without the corporate seal, executed by a trustee of the corporation, is not admissible in evidence without first showing the authority of the trustee to execute it, and the mere recital of such authority in the deed is no evidence of its existence: *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607, and note. But where the corporate seal is affixed to an instrument by the proper officer of the corporation, it is sufficient *prima facie* evidence of the authority of the officer executing it, and the instrument itself can be given in as evidence: *Wharf etc. Co. v. Simpson*, 77 Cal. 286. Drafts accepted by the treasurer of the corporation are presumed to be properly accepted by the corporation: *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123, and note; but the secretary of a corporation has no power, by virtue of his office, to make an assignment of a promissory note of the corporation: *Blood v. Marcuse*, 38 Cal. 590; 99 Am. Dec. 435, and note 437.

PEOPLE v. VAN NESS.

[79 CALIFORNIA, 85.]

EVIDENCE OF CONVERSION BY PUBLIC OFFICER. — If a public officer on being officially required to return a statement of his accounts replies that he has no property or moneys of the state in his possession, and has had none during his term of office, and it is shown that in fact he has received sundry sums for which he ought to have accounted, the court is justified in finding that these several sums were converted as fast as received.

OFFICIAL BOND IS NOT REGARDED AS DELIVERED PRIOR TO ITS APPROVAL by the proper officer, and it has no operation until delivered.

SURETIES ON OFFICIAL BOND ARE NOT ANSWERABLE FOR DEFAULTS OF THEIR PRINCIPAL OCCURRING BEFORE ITS DELIVERY.

STATUTE OF LIMITATIONS DOES NOT COMMENCE RUNNING AGAINST AN ACTION ON AN OFFICIAL BOND until the close of the principal's term of office, though the conversion of which he is found guilty took place at a much earlier time.

MONEYS COLLECTED UNDER COLOR OF OFFICE WITHOUT AUTHORITY OF LAW MUST BE ACCOUNTED FOR and paid to the state in whose name and by whose authority they were pretended to have been collected.

Van Ness and Roche, for the appellants.

Attorney-General Johnson, and Langhorne and Miller, for the respondent.

THORNTON, J. Action on the official bond of the defendant Van Ness, as commissioner of immigration of the port of San Francisco.

The bond on which this action was brought bears date on the 11th of January, 1876, on which day it was signed by Van Ness as principal, and Henry Barroilhet and Leland Stanford as sureties, was approved by the governor on the next day, and filed and recorded on the next day in the office of the secretary of state.

Van Ness held the office of commissioner of immigration from the seventh day of January, 1876, to the 21st of January, 1880.

During the incumbency of Van Ness, his official bond was by an act of the legislature, approved March 25, 1876, reduced from twenty-five thousand dollars to two thousand five hundred dollars.

Van Ness, subsequently to this amendment, filed an official bond in the sum of two thousand five hundred dollars, which was approved by the governor, and filed in the office of the secretary of state on the eighth day of May, 1876. This last bond was signed by Van Ness, and Barroilhet and one Moulder as sureties, on the twelfth day of April, 1876.

During Van Ness's incumbency, from March 25, 1876, to the end of his term, he collected and received in his official capacity, under the statute, as "the seventy cents," or capitation tax allowed by it, the sum of \$28,853.64, and of this amount he collected, —

From March 25, 1876, to April 12, 1876.....	\$1,284 50
From April 12, 1876, to May 8, 1876.....	2,648 10

Total from March 25, 1876, to May 8, 1876....\$3,932 60

Van Ness was entitled to a salary of \$4,000 per annum dur-

ing his incumbency of office, which amounted in the whole to \$15,277.78.

Of this amount his salary from March 25, 1876, to May 8, 1876, amounted to \$477.18.

The remainder of salary was received during the subsequent period of his term of office.

The action, as will be observed, is brought on the bond first executed in January, 1876, and it is contended that there never has been any breach of that bond.

The court held that during the period extending from the 25th of March, 1876, to the 8th of May, 1876, Van Ness received of the capitation tax above mentioned the sum of \$3,932.60; that the salary of Van Ness during the period above mentioned amounted to the sum of \$477.18, and that his office expenses during the same period of time amounted to \$336.30; that Van Ness was entitled to retain those last two mentioned sums out of the amount, \$3,932.60, collected by him; that the amount remaining after deducting the sum above mentioned for salary and office expenses, amounting to \$3,118.32, was prior to the 8th of May, 1876, and to the filing of the bond filed on that day, appropriated and converted to his own use by Van Ness, and that none of said last-named sum was held by Van Ness on the said 8th of May, 1876.

The condition of the bond was, that Van Ness in his official capacity should well, truly, and faithfully execute the duties of the trust, and perform all the official duties required of him by law.

That one of the duties assumed by Van Ness, as commissioner, was to keep the moneys collected by him, after making the deductions above mentioned, as the moneys of the state, to be paid over to the proper officer of the state at the proper time, we think there can be no doubt; and that a conversion of such moneys by him was a breach of his bond, we entertain as little doubt.

It is urged that there is no evidence of any such conversion. We think there is. On the 21st of February, 1883, John P. Dunn, the controller of state, in his capacity of controller, wrote to Van Ness requiring him to render immediately to the controller's office a statement of his account as commissioner of immigration, giving in detail the receipts from all sources during his (Van Ness's) incumbency in office. In the same letter Van Ness was required to pay at once into the state treasury all moneys held by him belonging to the state.

To this letter Van Ness wrote in reply on the 10th of March, 1883, that he had no property or moneys of the state in his possession, and had had none during his term of office or incumbency.

Here was a denial that he had ever had any moneys in his hands collected by him for the state during his term of office, and a refusal to pay any sum into the state treasury.

The admitted facts show the collections by Van Ness as above stated.

The evidence shows a denial by Van Ness of any right of the state to the moneys collected by him as the trusted officer of the state. This is a conversion within the rules of law on that subject. His declaration in his letter to Dunn was a denial of any right in the state, and a plain manifestation of the exercise by him of dominion over this money in defiance of the right of the state. We are of opinion that the court was fully sustained by the evidence in finding as a fact that there was a conversion of this money by Van Ness: See *Dodge v. Meyer*, 61 Cal. 420; *Liptrot v. Holmes*, 1 Ga. 381; *Cobb v. Doss*, 9 Barb. 242.

But it is argued that there was no conversion prior to the 8th of May, 1876. We think the court below was justified in holding that the money was converted by Van Ness as fast as received. He says in his letter above quoted that he has never collected or had in his possession any money as belonging to the state, and it is manifest that he all along regarded that the money collected by law belonged to him. We are of the opinion that the evidence justified the court below in finding that a conversion by Van Ness of the moneys for which judgment herein was rendered was made prior to the eighth day of May, 1876.

There was no delivery of the second official bond executed by Van Ness and sureties until the day on which it was approved by the governor: *Sacramento v. Bird*, 31 Cal. 74. We cannot see how there could have been any delivery until that date. The bond was not in a condition to be delivered until that date. Prior to that time it was inchoate and imperfect as a bond. Like every other deed, that bond was not operative until delivery. It follows that the parties to the second bond were not liable for any breach until after its delivery. There could have been no breach of this bond until after it was delivered on the 8th of May, 1876, but there was a breach of the bond sued on.

This action was not barred by the statute of limitations. Taking the view most favorable to defendants, the statute did not commence running until the close of Van Ness's term of office, on January 21, 1880. This action was commenced on the 23d of April, 1888. As this action was on a bond, the period required to effect a bar was four years: Code Civ. Proc., sec. 337. The action, it will be perceived, was brought in less than four years from the date of its accrual, in January, 1880.

Van Ness, during his term of office, paid into the state treasury the sum of \$1,135. This sum was a part of the moneys collected by him in pursuance of the provisions of section 2965 of the Political Code, as construed by him, for administering oaths to masters of vessels when making the reports required by section 2949 of the Political Code. It was collected prior to the 8th of May, 1876.

This sum (\$1,135) was collected by Van Ness in his official capacity and under color of office. There was no authority of law for collecting any such moneys of the ship-masters.

It is now contended by Van Ness that as this money was collected by him without legal sanction, he had a right to retain it as his own, and as he did not retain it, but paid it into the treasury, he should have been credited with it by the court below, and that the amount should be deducted by this court from the amount of the judgment.

We cannot give our sanction to this contention. The money, having been collected under color of office, should have been paid into the state treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it. He only did his duty in paying it over to the state. It belonged really to the ship-masters of whom it was collected; but the state, in whose name and by whose authority it was pretended to have been collected, was the proper custodian of such moneys.

The record is free from error.

Judgment and order affirmed.

OFFICIAL BONDS — STATUTE OF LIMITATIONS. — Cause of action against an officer for retaining money accrues at the expiration of such officer's term, and from that time the statute of limitations begins to run against the claim of the state: *People v. Van Ness*, 76 Cal. 121.

OFFICIAL BONDS — SURETIES UPON. — Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of office for which the bond was made: *State v. Powell*, 4 La. Ann. 241; *First*

National Bank v. Girke, 68 Md. 449; 6 Am. St. Rep. 453. Compare extended note to *Crawn v. Commonwealth*, 10 Id. 843-860, as to the liability of sureties on successive official bonds. The liability of sureties is limited to the official term: *Board of Supervisors of L. County v. Alford*, 65 Miss. 63; 7 Am. St. Rep. 637, and note 640; *Mutual Loan etc. Ass'n v. Price*, 16 Fla. 204; 26 Am. Rep. 703. Sureties are not liable upon an official bond for misappropriations made before the delivery of their bond: *Inhabitants of Rochester v. Randall*, 105 Mass. 295; 7 Am. Rep. 519, and note 521. Compare extended note to *Commonwealth v. Cole*, 46 Am. Dec. 509-517, as to liability of sureties for acts of principal done *colore officii*.

OFFICIAL BONDS. — The failure of the court, or officer whose duty it is to approve an official bond, to perform that duty, will not affect the validity of the bond: Note to *People v. Hartley*, 82 Am. Dec. 764.

BARTLETT v. ODD FELLOWS SAVINGS BANK.

[79 CALIFORNIA, 212.]

AN ATTORNEY MAY CONTRACT WITH HIS CLIENT FOR A SPECIAL FEE in a special case, where the client is a corporation which the attorney is serving at a salary which may be changed at the option of the corporation, and when the period of the attorney's employment is subject to the same condition.

AN ATTORNEY DISCHARGED WITHOUT CAUSE WHILE ACTING UNDER CONTRACT, UNDER WHICH HE WAS TO HAVE A SPECIFIC AMOUNT FOR SERVICES which he had agreed to render, may recover the amount to which he would have been entitled had his client allowed him to complete the services which he had commenced to perform. The client, by wrongfully preventing the performance of the acts which entitled the attorney to the special compensation, becomes answerable in damages in such amount, with interest from the time it became due.

STATUTE OF LIMITATIONS. — WHERE AN ATTORNEY AT LAW AGREES TO RENDER SERVICES IN THE PROSECUTION OF AN ACTION, for which he is to be paid a specific sum when judgment is entered, a compromise obtained in favor of his client and the attorney is wrongfully discharged before the action is terminated. The statute of limitation does not commence to run against claim for compensation until judgment is recovered or a compromise made.

C. L. Tilden, for the appellant.

Stanly, Stoney, and Hayes, for the respondent.

FOOTE, C. This action was brought by an attorney at law to recover a sum of money alleged to be due him by the defendant. Judgment passed for the plaintiff as prayed for, from which, and an order denying a new trial, the defendant appeals.

The points made for the reversal of the judgment and order are:—

1. That the facts set up in the complaint show that the action was not brought to recover compensation for services rendered as an attorney, but that the cause of action is founded upon a breach of contract by the defendant, and arose when the relation of attorney and client was terminated, and was therefore barred by the statute of limitations.

2. That the contract as alleged is of a kind where the presumption arises that it has been entered into without consideration, and under undue influence, and this presumption has not been overcome by the plaintiff.

3. That the contract alleged was entered into by the defendant while laboring under a mistake of fact, and that the defendant had a right under the law to rescind it.

4. That the complaint is insufficient in that it does not contain an allegation of damages, and therefore is not sufficient to support the judgment.

The case as presented by the record is one where an attorney at law, who was the general attorney of the corporation, at a salary which might be changed at the option of the corporation, and whose period of employment as such was subject to the same condition, was voluntarily and without any effort, fraud, or undue influence on his part, employed specially by the corporation, through its proper officers, to perform certain special work, which he was ready and willing to perform, and did partially perform, but which the defendant prevented him from fully accomplishing through no fault of his.

The compensation of the attorney was to depend for its time of payment upon the time when the corporation should obtain by judgment or compromise the payment of a claim it had against William Sharon. Its amount was to be controlled by the amount received from said Sharon.

A certain sum of money was received from that source by the corporation, but before that time it had discharged the plaintiff from being its attorney, and on his demanding the amount of money which he claimed under the contract that he was entitled to have, payment was refused, and before the time of the running of the statute of limitations from the date of the reception of the money by the corporation, this suit was instituted.

The corporation had the power to change the amount of the attorney's salary in its general employment at any time, so it could as to the term of his employment.

In this existing state of relationship of the parties, it does

not seem at all wrong that in a special case the attorney should enter into contract with his principal for a special fee. And if, as in this case, the employment is voluntarily tendered to him by those competent to contract with him, with a full knowledge of their right, and of the circumstances under which they are acting, we do not perceive anything improper in it.

Mr. Bartlett, the plaintiff, did not seek the employment; it was tendered to him. He did not misstate any facts, or mislead the defendant. The contract was entered into with a true appreciation of the situation surrounding the transaction, and was in no sense unfair.

To us it seems as if the plaintiff was discharged without cause, and did not forfeit any of his rights.

The suit has been instituted to recover the amount of money to which the plaintiff would have been entitled had the defendant allowed him to complete the services which he had commenced to perform. If the defendant, by its wrongful conduct, prevents the performance of acts which entitle a party to a specific recompense, it would seem that such amount, and interest from the time it became due, may be recovered in an action which sets forth such a state of facts.

The plaintiff could not sue for damages resulting from his discharge at the time of such discharge, because he could recover no money under his contract until the defendant should be paid some by William Sharon. The moment that money came to the hands of the defendant, and not until then, was the plaintiff entitled to his proportionate share of it. His cause of action could not accrue until the condition had happened,—that is, the money had been paid by William Sharon to the defendant,—by means of which alone the plaintiff would be entitled to anything.

Had the plaintiff brought his action for damages for the non-compliance of the defendant with its contract in discharging him without allowing him fully to perform the services he had undertaken, the defense would have been that no damages could be recovered, because no money had been received from William Sharon; that the condition on which the plaintiff was alone to be paid had not happened, and the amount of his compensation could not be determined, as it also was contingent on and a proportionate part of the amount which Mr. Sharon might pay.

There can be no doubt that the plaintiff's cause of action

accrued when the defendant received the money and refused to pay him his share of it. The statute of limitations did not, therefore, bar the action. The detriment caused by the breach of the defendant's obligation to pay the plaintiff the amount of money which it had agreed to pay is the amount due by the terms of the obligation, with interest thereon: Civ. Code, sec. 3302.

The allegations of the complaint are, that the defendant is under an obligation to pay the plaintiff a certain sum of money and interest, and that it has refused to comply with such obligation, and that therefore a certain sum of money and interest is due, for which judgment is prayed.

When the plaintiff, as here, alleges facts to exist which, if proved, would entitle him to recover the sum of money he demands from the defendant, he has shown, so far as the recitals of the complaint can, that he has sustained damages.

When he proves the facts, he should recover a judgment for the sum of money he has thus shown himself to be entitled to. If he states the facts in his complaint which, in law, constitute his damages, and their measure, he has shown enough in the pleading to warrant a recovery of what he claims, if his proof corresponds to his allegations.

We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

BELCHER, C. C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

ATTORNEY AND CLIENT. — An attorney can make a special contract with a client to prosecute a suit in equity for a certain fee, and a further fee contingent upon success in the case; but where the client dismissed the suit without his attorney's consent, the attorney could not recover the whole contingent fee, but he may recover on a special count, or a *quantum meruit*, for the reasonable value of his services: *Polsey v. Anderson*, 7 W. Va. 202; 23 Am. Rep. 613.

DISCHARGE OF AGENT OR ATTORNEY, whereby he is prevented from fulfilling his contract, and thereby earning the compensation which he would have been entitled to receive on such fulfillment, vests in him a cause of action against his principal if the discharge was wrongful; and the measure of damages is the full amount stipulated to be paid him by such contract: *Durkee v. Gunn*, 41 Kan. 496; 13 Am. St. Rep.

ATTORNEY AND CLIENT — STATUTE OF LIMITATIONS. — A contract of an attorney to carry on or defend a suit is an entire contract, and the period of limitation runs only from the termination of the suit: *Elliot v. Lawton*, 7 Allen, 274; 83 Am. Dec. 683.

WITHERS v. JACKS.

[79 CALIFORNIA, 297.]

SALE UNDER REVERSED JUDGMENT. — If, in a suit to foreclose one mortgage, in which the mortgagors and the holder of another mortgage are made parties defendant, a decree of foreclosure is entered from which the mortgagee defendant appeals, and obtains a reversal on the ground that the court erred in determining the priorities of the respective mortgages, to which appeal the mortgagors, however, were not parties, the judgment of reversal does not affect the sale of the mortgaged premises made to the plaintiff before such reversal, the execution of the judgment not having been stayed pending the appeal; and the plaintiff, having obtained a sheriff's deed pursuant to the sale, holds title paramount to that of the other mortgagee.

ACTION TO QUIET OR DETERMINE CONFLICTING CLAIMS OF TITLE may be maintained against one who claims to have a mortgage on the premises.

S. O. Houghton and S. F. Leib, for the appellant.

N. A. Dorn and W. M. R. Parker, for the respondent.

McFARLAND, J. This is an action to quiet title to certain lands in Monterey County, described as "lots 1 and 2" of a certain range. The answer denies that plaintiff is the owner of the land, or that he has any estate or right or title to the same, or any part thereof; and avers that defendant has a mortgage upon said land executed by one Milton Little and his wife, Mary Little, bearing date July 21, 1874. The court below gave judgment for plaintiff, and defendant appeals from the judgment, and from an order denying a new trial.

Plaintiff holds title to the land by virtue of a sheriff's deed made upon the foreclosure of a mortgage by Milton Little and wife to James W. Withers, executed December 11, 1875, and recorded the next day, and also of another mortgage executed by said Little and wife to David Jacks (defendant herein), dated July 21, 1874, but not recorded until June 2, 1876. The foreclosure suit was brought by said James W. Withers, and Jacks was made a party defendant therein. The Littles made default, and consented that Jacks's mortgage might also be foreclosed. Both mortgages were foreclosed. There was a contest between Withers and Jacks as to priority between the two mortgages. The court decided that contest in favor of Withers. Jacks appealed, but did not get or ask for any stay of execution. The land was sold under the decree of foreclosure to James W. Withers, and in due time—no redemption being made—he received a sheriff's deed; and the title under said deed was conveyed to Milton Withers, the

plaintiff in this present action. On Jacks's appeal the judgment was reversed on account of defective findings on the issue of priority between the two mortgages; but it must be taken to have been conclusively held in that case (*Withers v. Little*, 56 Cal. 370), and in the subsequent case of *Little v. Superior Court*, 74 Cal. 219, that the Littles were not affected by the appeal, and that the sale under the foreclosure was final. We think, therefore, that the court correctly found that the plaintiff is the owner in fee of the land. (Milton Little, the former owner of the land, died testate, and devised it to Mary Little, who conveyed to plaintiff herein; so that plaintiff also in that way represents the former owners.)

2. Appellant, having denied that respondent had any title or right to the land, and put him to his proof, ought not to be heard to say now that a mortgage is not such an interest as will justify a decree quieting title. Moreover, we think that the claim set up by appellant would be a cloud on respondent's title, which he has a right to have quieted. "The plaintiff has a right to be quieted in his title whenever any claim is made to real estate, . . . the effect of which claim might be litigation, or a loss to him of his property": *Head v. Fordyce*, 17 Cal. 149. Section 738 of the Code of Civil Procedure is "intended to embrace every description of claim whereby the plaintiff might be deprived of his property, or its title clouded, or its value depreciated": *Id.*

3. We think the findings cover all the material issues in the case.

Judgment and order affirmed.

ACTION TO QUIET TITLE MAY BE MAINTAINED against a mortgagee: *Joyce v. McAvoy*, 31 Cal. 473; 89 Am. Dec. 172; Cal. Code Civ. Proc., sec. 738; but an action to quiet title cannot be maintained against the holder of the legal title by the holder of an equitable title: *Von Drachenfels v. Doolittle*, 77 Cal. 295. Compare *Hoffman v. Woods*, 40 Kan. 382.

JENNINGS v. BANK OF CALIFORNIA.

[79 CALIFORNIA, 322.]

A BANK HAS AN EQUITABLE LIEN ON SHARES OF ITS STOCK for all sums of money due from the person in whose name such stock stands, when the certificate for such stock declares, "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name stock stands on the books of the bank, except by the written assent of the president or cashier"; though there was no by-law of the corporation nor any resolution of its board of directors authorizing the insertion of this condition in this certificate. A stockholder who accepts a certificate with this condition printed on it, and then borrows money of the bank, must be held to have assented to the condition, and to be bound by it.

ASSIGNEE OF STOCK IN A BANK, THE TRANSFER TO WHOM HAS NOT BEEN ENTERED UPON ITS BOOKS, has a mere equity which must yield to any superior equity or lien of the bank.

CONDITION PRINTED IN AND UPON A CERTIFICATE OF STOCK is sufficient to put a purchaser thereof on inquiry, and make it his duty to ascertain whether the stock is free of such condition.

ASSIGNEE OF STOCK IN A BANK WHO GIVES NO NOTICE OF THE TRANSFER TO HIM holds title subordinate to any lien the bank may have for money advanced to his assigner in ignorance of the transfer.

Newlands, Allen, and Herrin, for the appellant.

Lloyd and Wood, for the respondent.

HAYNE, C. Action for damages for the refusal of the defendant to make a transfer upon its books of certain stock to the plaintiff; judgment for plaintiff; defendant appeals.

The material facts are as follows: In 1879, one Bowman became the owner of certain stock in the bank; and this stock was transferred to him upon the books of the corporation. The certificate was as follows:—

"No. 131. This is to certify that A. W. Bowman of San Francisco is the proprietor of sixty-seven shares of the capital stock of the Bank of California, which is transferable only upon the books of the bank, personally, or by attorney, upon the surrender of the certificate, after compliance with the conditions printed on its back.

"SAN FRANCISCO, October 21, 1879.

"S. FRANKLIN, Secretary.

"THOMAS BROWN, Cashier.

"WILLIAM ALVORD, President."

The condition referred to in the body of the certificate was as follows:—

"No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name the stock stands on the books of the bank, except with the written consent of the president or cashier."

There was no by-law of the corporation or any resolution of the board of directors authorizing the insertion of such a condition in the certificate. But from the time of the organization of the bank, in 1864, such a condition was always inserted, although the bank had never refused to make transfer by reason of the indebtedness of a stockholder, except in the present instance. It does not appear, however, that occasion for such refusal had ever arisen.

Bowman received the stock without objection. He was a depositor of the bank at the time; and on May 4, 1883, was indebted to the bank on overdrafts in upwards of eighty thousand dollars. On that day, he transferred his stock to the plaintiff for value, and indorsed and delivered the certificates to him. No notice of this transfer was given to the bank until October 16, 1884, when the plaintiff demanded a transfer of the stock to him upon the books. In the mean time the bank continued to pay the quarter-yearly dividends to Bowman, and to lend him money on overdrafts. On October 13, 1884, which was two days before the notice of the transfer, Bowman owed the bank \$98,786. This indebtedness was subsequently reduced to \$30,394.75, which sum remains due. The bank refused to transfer the stock to the plaintiff upon its books until Bowman's indebtedness to it was discharged.

1. As between Bowman and the bank, we think that the latter had an equitable lien upon the stock, for the sum due to it. The counsel for the respondent makes several points in this regard.

(a) It is argued that the terms upon which shares of stock may be transferred are prescribed by the statute, and that the corporation had no power to annex other conditions. So far as the power of corporate legislation is concerned, this may be conceded. And it may be assumed, for the purpose of the case, that a corporation could not make a by-law which would operate in and of itself to create a lien upon the stock for the indebtedness of the stockholder. But the power to legislate is one thing, and the power to contract is quite another. In the language of Angell: "What may be bad as a by-law against common right may be good as a contract, since a man may

part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law, passed without his assent, or perhaps knowledge, by those who might not know or would not consult his individual interests": Angell on Corporations, 8th ed., sec. 342. And to say, as is said by the learned counsel, that no additional limitation can be added by contract in a particular case, seems to us to be going altogether too far. No statute has been called to our attention which prohibits a corporation like the defendant from lending money on its own capital stock; and in the absence of such a prohibition, we think that such a loan is not *ultra vires*. If this be so, it cannot be doubted that if the authorized officers of the bank had taken the certificate in pledge for the indebtedness, the bank would have had a lien thereon, and, having such a lien, could not be compelled to transfer the stock until the indebtedness secured by the lien had been discharged. And we can see no difference in principle between the case put and one where the loan is made upon an agreement that the stock shall stand upon the books as security for the indebtedness. The only possible difference is in the kind of security taken; and this does not affect the question.

Then was there a contract for an equitable lien? We think that such a contract must be implied from the conduct of the parties. We do not say that the mere acceptance by the stockholder of the certificate without objection would constitute a contract in the absence of subsequent dealings with reference thereto. It is not necessary to express an opinion upon such a case. But we think that the acceptance, without objection, of the certificate containing such a condition, and the subsequent borrowing of money from the bank without anything to exclude the idea that the condition was to be binding, amounts to an assent to it, so far as the particular loan was concerned, and that a contract is to be implied that the stock was to stand upon the books as security for the loan.

"An implied contract is one the existence and terms of which are manifested by conduct": Civ. Code, sec. 1621; or in the language of a learned writer, "is inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice": Metcalf on Contracts, 4. In the present case every consideration of justice leads to the implication of an agreement for security. The stockholder knew, from the conditions of the certificate, the terms upon which he could borrow money from the bank; with such

knowledge he borrowed the money without raising any objections to the terms, and we think that he must be held to have assented to them and to be bound by them. And the result of the contract so made is the creation of an equitable lien in favor of the bank.

In *Waln v. Bank of North America*, 8 Serg. & R. 89, which was an action like the one before us, there was no by-law or written regulation of the board giving a lien upon the stock, but the court held that a lien arose from the borrowing of money from the bank with knowledge of its usage in that regard, and said: "A course of dealing—a usage, an understanding, a contract express or implied—is the lien of the parties and a law to them, provided they are not repugnant to the charter or the laws of the land. . . . The understood notice to Mr. Waln, his continuing to deal with the bank, with full knowledge of this term and condition, is equally binding on him and the present plaintiffs as if it were a written regulation, a by-law, a provision in the charter, or clause inserted in the very certificate of stock. The bank had an undoubted right to say to any stockholder: 'We discount your note; but remember, until it is paid we shall hold your stock in security. You shall not be permitted to transfer it until you pay us.' . . . Call this answer of the bank what you please, — lien, set-off legal or equitable, pledge, retainer, stoppage, course of dealing, general undertaking, usage, contract express or implied,—it is a bar in law and equity to this action."

The case of *Vansands v. Middlesex Bank*, 26 Conn. 144, is precisely in point. That, like the present case, was an action for damages for the refusal to transfer stock upon the books of a corporation. It was conceded that no lien upon the stock was given to the bank, either by the by-laws, or by the charter, or by statute. The certificates of stock, however, contained a condition like that in the case before us, to the effect that the transfer upon the books should be subject to the indebtedness of the stockholder. The court held that the acceptance of such a certificate without objection, and a subsequent loan by means of the discount of a note, effected a contract which created an equitable lien for the amount of the indebtedness. And Storrs, C. J., delivering the opinion, said: "To consider it otherwise than as an agreement would be to disregard the plain intention of the parties, which courts will always, if possible, carry into effect, and to sanction the perpetration of a fraud on the defendants. Smith having re-

ceived the certificate proffered to him by the defendants with that restriction, neither he nor his assignee should be permitted to deny his assent to it, and that would be sufficient to constitute an agreement."

(b) It is urged that the insertion of the provision in the certificate of stock was the act of the president, secretary, and cashier only; that there was no by-law or any action of the board of directors in relation thereto; and consequently that the insertion of the provision was unauthorized. But so far as the contract between the borrower and lender is concerned, we think that this is immaterial. It might perhaps be argued that the fact that the condition was inserted in every certificate of stock since the organization of the bank shows that the proceeding was sanctioned by the board, although there was no formal authorization of it; for under such circumstances it cannot be supposed that the board was ignorant of it. But waiving this, the officers from whom Bowman obtained his loan must be held to have had authority to arrange the terms of the loan. The officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto: *McKiernan v. Lenzen*, 56 Cal. 63, 64; *Donnell v. Lewis Co. Bank*, 80 Mo. 171; *Reynolds v. Collins*, 78 Ala. 97; *Case v. Citizens' Bank*, 100 U. S. 455. And the authority to arrange the security upon which a loan is to be made is certainly incidental to the making of the loan itself. So that, even if the party who obtained the loan could raise a question as to the authority of the officers with whom he dealt, it must be held that there was ample authority so far as the particular case is concerned.

(c) It is contended that the bank, by its by-laws subsequently adopted, modified the force of the stipulation contained in the certificate. This contention is based upon the fact that the bank reorganized under the code, and adopted by-laws which, after providing for the issuance of certificates of stock, declare that "these certificates shall be transferable by indorsement and delivery thereof, the transfer to be complete and binding upon the bank only when recorded upon the books of the bank," and do not provide for any lien such as is claimed here. But we see nothing in this which forbids the contract for a lien upon particular shares to secure a loan to a stockholder, or which requires a transfer of the shares, notwithstanding the existence of such a lien. It would have been an unnecessary precaution to have added to said by-law the

words "but no such transfer shall be made in cases where the bank acquires by contract a lien upon the stock." As we have stated above, the lien is independent of the by-laws, and there is nothing in them which forbids the acquirement of a lien in the manner specified.

(d) It is said that there was no usage from which a lien could arise; that, as a matter of fact, the bank never insisted upon any lien upon a share-holder's stock, except in this single case. But while we have cited a case to show that a contract could arise from dealing with reference to a known usage as being an analogous case, we have not placed the matter upon the ground of usage. Our opinion proceeds upon the proposition that the acceptance of the certificate of stock containing the condition in question, and the subsequent borrowing of money, without anything to exclude the idea that the condition was to govern, creates an implied contract, from which an equitable lien arises. This was the ground of decision in the Connecticut case, which expressly states that it did not proceed on the ground of usage. We should reach the same conclusion if this had been the only certificate and transaction of the kind which had ever occurred. Nor can it be said that there was any usage against such a transaction. For while this was the only instance in which the lien was sought to be enforced, it does not appear to have been necessary to insist on it in any other case. For aught that appears to the contrary, the other share-holders may have all been able to discharge their indebtedness, if any existed, and may have in fact done so.

(e) It is argued that the bank waived its lien by lending money upon the personal credit of the stockholder. But there is nothing in the record which shows that the advances were made upon personal credit alone. The findings do not so state. It appears from the statement on motion for new trial that the cashier said in the course of his testimony: "If a party is in good standing, we don't question his right to a transfer; we waive it by transferring. We do not pretend to claim the right to refuse a transfer against a share-holder in good credit." This is the only thing which we find in the evidence in relation to the matter. It certainly does not show that the advances in this case were made on personal credit alone. For, aside from any other reason, it does not appear that the share-holder was "in good credit." This cannot be inferred from the mere fact that he was allowed a large over-draft. For it

may be that this was allowed in view of the lien upon the stock. It may be that his credit was not good enough for so large an advance without taking into consideration the security upon the stock. And unless it appeared that the advances were made on personal credit alone, or on some other security, without reference to the stock, there would be no waiver: See, generally, *Union Bank v. Laird*, 2 Wheat. 390.

2. The assignee of Bowman is not protected by the rule as to *bona fide* purchasers for value. Without considering the question as to the negotiability of certificates of stock, it is sufficient to say, in the first place, that, as against the bank, the plaintiff was not the assignee of the legal title. The code provides that the transfer by indorsement and delivery of the certificate "is not valid, except between the parties, until the same is entered upon the books," etc.: Civ. Code, sec. 824. As against the bank, therefore, the assignee took a mere equity, which must yield to the superior equity of the defendant: *Vansands v. Middlesex Bank*, 26 Conn. 153, 154; *Taylor v. Weston*, 77 Cal. 534; *Stebbins v. Phenix Ins. Co.*, 3 Paige, 361; *Union Bank v. Laird*, 2 Wheat. 393; *McReady v. Rumsey*, 6 Duer, 582. In the next place, the condition in the certificate was sufficient to put the plaintiff upon inquiry. The case of *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 362, is not in conflict with this. There no condition was embodied in the certificate, and the by-law relied upon was not referred to therein or printed thereon.

Nor is the plaintiff in any better position as to advances made after the transfer. For, according to the terms of the certificate, the indebtedness secured was that "of the person in whose name the stock stands on the books of the bank"; and the plaintiff gave no notice of the transfer, but allowed his assignor to continue to draw the dividends and to act as owner.

The equities of the bank were specially set up in the answer, and constitute an equitable defense to the action. The findings contain all the material facts.

We therefore advise that the judgment and order be reversed, and the cause remanded, with directions to enter judgment for the defendant.

BELCHER, C. C., and GIBSON, C., concurred.

The COURT. — For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded.

with direction to the court below to enter judgment for the defendant.

Hearing in Bank denied.

CORPORATIONS — LIEN OF THE CORPORATION ON SHARES: See the general law in respect to this subject in Lawson's Rights and Remedies, sec. 465, and cases cited; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Fitzhugh v. Bank of Shepherdville*, 3 T. B. Mon. 126; 16 Am. Dec. 90.

CORPORATIONS — TRANSFER OF STOCK. — The assignment and delivery of stock transferable upon the books of a corporation passes an equitable title, even before the transfer is perfected upon the books: *Noble v. Turner*, 69 Md. 519. While each assignor and assignee of corporate stock is liable to the corporation for calls made upon the stock until full par value has been paid, between the assignor and assignee there is no obligation implied on the part of the assignor to pay calls made subsequent to his transfer against a prior assignor: *Brinkley v. Hambleton*, 67 Md. 169; compare *West Nashville etc. Co. v. Nashville S. Bank*, 86 Tenn. 252; 6 Am. St. Rep. 835, and note 838, 839; *Caulkins v. Gas Light Co.*, 85 Tenn. 683; 4 Am. St. Rep. 786, and note 798; *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586, and note 594; *Lippitt v. American etc. Co.*, 15 R. L. 141; 2 Am. St. Rep. 886, and note 891; *Young v. South T. I. Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and note 759; *Taylor v. Weston*, 77 Cal. 534.

[IN BANK.]

COUNTY OF YOLO v. BARNEY.

[79 CALIFORNIA, 375.]

LAND MUST BE REGARDED AS DEDICATED TO PUBLIC USE WHEN IT IS PURCHASED BY THE COUNTY FOR THE PURPOSE OF BUILDING A COUNTY HOSPITAL on a portion of it, and using the balance for the necessities of such hospital, and when the county, after such purchase, establishes and maintains a hospital thereon. The fact that the county had the right of revoking the use of the land, and applying it to other purposes, does not prevent the operation of the dedication.

IRREVOCABLE DEDICATION OF LAND TO PUBLIC USE IS NOT NECESSARY TO PREVENT AN ADVERSE POSSESSION THEREOF FROM RIPENING INTO PRESCRIPTIVE TITLE.

DEDICATION TO PUBLIC USE, WHAT IS. — If a public building, such as a hospital, is erected upon land belonging to the county by the proper authorities, and is devoted to uses necessary to the character of the building and the purpose for which it is erected, such land is dedicated or put to a public use.

DEDICATION TO PUBLIC USE. — There is no form necessary for the dedication of lands for public use. All that is required is the assent of the owner of the land, and the fact of its being used for a public purpose intended by an appropriation.

STATUTE OF LIMITATIONS. — If LAND BELONGING TO A COUNTY, purchased and used by it for hospital purposes, is taken possession of by an intruder, his possession, however long continued, cannot create a prescriptive title in his favor.

Thomas and Hurst, for the appellant.

Frank S. Sprague and F. E. Baker, for the respondent.

FOOTE, C. This action was brought by the plaintiff to quiet its title to a piece of land claimed adversely by the defendant. An answer and cross-complaint was filed by the latter, in which, after denying the right and title of the plaintiff, she claims title by continuous adverse possession for more than five years before the commencement of the action, and asks that the plaintiff be made to show its interest in the land, and that her title thereto be quieted.

The court found, among other things, that all the allegations of the complaint were true; that the defendant was not the owner of the land, although she had been in possession of it for more than five years; that her possession was not such as entitled her to obtain title through the statute of limitations; that the land had been long before her entry dedicated to a public use by the county of Yolo, and that the right to such public use had never been relinquished or abandoned.

And as conclusions of law, "that neither the defendant nor her grantors ever acquired any right, title, or interest in or to the land in controversy so dedicated to public use by their possession of the same; nor does the fact of such possession constitute a sufficient defense to this action."

Judgment was given quieting the plaintiff's title to the land, as against the defendant, and for costs. From that and an order refusing a new trial the appeal is taken.

It is contended that the findings are not supported by the evidence, chiefly for the reason, as alleged, that the land was never dedicated to a public use, but was bought by the county as a private individual would buy property, and was subject to be resold by the county, abandoned as to whatever use it might have been temporarily put, and subject, like ordinary municipal or private property, to be acquired by peaceable and continuous adverse possession under the statute of limitations of five years.

The facts in evidence show that the land was purchased by the county, acting through its *quasi* trustees, the board of supervisors, for the purpose of erecting thereon a county hospital, and using the land for purposes connected therewith.

The hospital had been established thereon for about eight years when the defendant's grantor took possession of and fenced the portion of the land in controversy, which up to that

time had been uninclosed, and the defendant's possession by herself or grantors has been since that time, for about fifteen years, peaceable and continuous. A deed to the land was made to the plaintiff in 1863 by one Freeman, and duly recorded, and a quitclaim deed was also made from the same grantor to the defendant's grantor, one Sill, in 1867.

The whole controversy seems determinable by ascertaining whether or not the land was dedicated to a public use when the hospital was erected thereon. If it was dedicated to a public use, then, under the decision of the appellate court in *Hoadley v. San Francisco*, 50 Cal. 276, it could not be subjected to the operations of the statute of limitations. If it was not so dedicated, it would be subject, as lands ordinarily held by a municipality are, to the running of the statute: *San Francisco v. Calderwood*, 81 Id. 588; 91 Am. Dec. 542; *Hoadley v. San Francisco*, *supra*.

Was it devoted or dedicated to a public use? It was purchased for the purpose of building a county hospital on a portion of it, and using the balance of it for the necessities of the hospital. For eight years all the land was necessary for, and was used for, the purpose of maintaining the hospital before the defendant's entry and possession. The hospital was not removed from the land until within about a year of the institution of this action.

The defendant contends that the dedication to a public use was never made, because, as she alleges, the county had the right of revoking the use of the land for county purposes, and that no dedication to a public use can be effectual unless it be irrevocable. The case of *San Francisco v. Canavan*, 42 Cal. 553, is cited as conclusive upon the point.

That case was not one in which the facts were as in this case, and we do not think that by the term "irrevocable," as there used, it was intended to say where a municipal corporation has devoted land to a public use that because it is within the power of that body to dispose of the land in some other way if it shall choose, the power of disposition being limited by statute, that such dedication to a public use can never be made.

The term "irrevocable," as it originally came to be used, was ordinarily applied to a private individual who had dedicated land to a public use in such a way that he had reserved no right to reclaim it. But in the case of a county which buys land for a public use, and devotes it to that purpose, we can...

not see any reason to declare that the dedication is incomplete, because the county may have the power given by statute afterward to discontinue the use and apply the land to another public use or sell it in a statutory and limited way: Pol. Code, sec. 4046, subd. 10.

If this was the rule, then it might be applied to county roads, for the county may abandon the use of them, and the dedication may be said in that sense to be revocable: Pol. Code, sec. 2681. Yet such roads are dedicated to the public use, as well as streets in a city, and the statute of limitations will not run against it: *People v. Pope*, 53 Cal. 450; *Visalia v. Jacob*, 65 Id. 436; 52 Am. Rep. 303.

The question then recurs, Did the board of supervisors, acting for the county, apply this land to a public use?

Hospital buildings are public buildings: Pol. Code, sec. 4046, subd. 9. If a public building be erected upon land belonging to the county by the proper authorities, and it be devoted to the uses necessary to the character of the building and the purpose for which it is erected, it would seem as if the land was dedicated or put to a public use.

Court-houses, jails, and hospitals are put upon the same footing by the statute, *supra*, are called called "public buildings," and they are such to all intents and purposes. It will not do to say that the land on which they stand, or which is appurtenant and necessary thereto, is not dedicated to a public use. To hold otherwise would be to leave county jails, hospitals, court-houses, and other public buildings, and the ground on which they stand, at the mercy of careless or corrupt county officials, and rapacious trespassers in collusion, perhaps, with such officers. This is contrary to public policy.

Judge Dillon, in his work on municipal corporations (vol. 2, sec. 533, p. 674), says: "The author cannot consent to the doctrine that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle."

The appellate courts of Pennsylvania, New Jersey, Rhode Island, and Louisiana hold to this view, and it seems to have been approved by the supreme court of California in *Hoadley v. San Francisco*, *supra*.

As we understand the decisions of California, they place the non-running of the statute of limitations upon the ground that the public is in the use of the land, and that while in such use a trespasser may neither erect a nuisance thereon nor acquire

a right to hold the land based upon a supposed grant to the land from the owner: *Hoadley v. San Francisco*, *supra*; *People v. Pope*, *supra*.

In reference to dedications to public use, it was said by the supreme court of the United States in *City of Cincinnati v. White's Lessee*, 6 Pet. 440: "There is no particular form necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis and Dean*, already referred to, with respect to a street, and the same rule must apply to all public dedications."

"The law applies to them rules adapted to the nature and circumstances of the case": *City of Cincinnati v. White's Lessee*, 6 Pet. 434.

"All public dedications must be considered with reference to the use for which they are made": *City of Cincinnati v. White's Lessee*, 6 Pet. 437.

After diligent search, no case has been found in the books presenting the same state of facts as this record shows. We see no reason why the use of county land for court-houses, jails, county hospitals, and other public buildings may not be placed upon the same footing as being public places. Public policy requires that such protection should be given to public rights.

We therefore advise that the judgment and order be affirmed.

HAYNE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Rehearing denied.

DEDICATION TO PUBLIC USE. — Dedication is defined as an appropriation of land for any public use: *Bushnell v. Scott*, 21 Wis. 451; 94 Am. Dec. 555; and the essentials of dedication are laid down in note to *Stacey v. Miller*, 55 Am. Dec. 113; note to *San Francisco v. Calderwood*, 91 Am. Dec. 545; note to *State v. Trask*, 27 Am. Dec. 554; *Plumer v. Johnson*, 63 Mich. 165; *Chicago v. Hill*, 124 Ill. 646; *Bloomington v. Cemetery Ass'n*, 126 Id. 221.

DEDICATION TO PUBLIC USE, HOW CREATED. — The simple fact of dedication to public use of an alley in a city makes it a public way, and no further action is required on the part of the city to open it for the use of the public generally: *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186, and note 189, with recent cases therein cited; *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599, and note 601; *San Leandro v. Le Breton*, 72 Cal. 175.

STATUTE OF LIMITATIONS — DEDICATION. — Title to a street cannot be acquired by adverse possession by a private person: *Visalia v. Jacob*, 65 Cal. 434; 52 Am. Dec. 303; *Fort Smith v. McKibben*, 41 Ark. 45; 48 Am. Rep. 19. The right to a street dedicated to public uses cannot be acquired by adverse occupation as against the public: *San Leandro v. Le Breton*, 72 Cal. 170. Where a private right of way was claimed by deed over land which, by the operation of that and other deeds, became dedicated to public use, but such dedication had not been accepted by the public, an open, visible, uninterrupted, and adverse possession of a part of the right of way for the statutory period would bar the private right of way, but not the right of the public in such right of way: *Street v. Griffiths*, 50 N. J. L. 656. But although the statute of limitations does not run against the sovereign power ordinarily, municipalities are not exempt from the operation of the statute, when seeking to recover land dedicated to public use: *Lessee of City of Cincinnati v. First Presb. Church*, 8 Ohio, 298; 32 Am. Dec. 718, and note 719-721.

CURDY v. BERTON.

[79 CALIFORNIA, 420.]

WILL — ORAL DIRECTIONS WITH RESPECT TO THE DISTRIBUTION OF PROPERTY. — Will by which a testator gives certain property to a trustee, "to be distributed according to the private instructions I give him," is valid and enforceable, if it appears that the trustee was present when the will was made, and was orally instructed by the testator to distribute such property among certain persons. If a testator bequeaths property in trust to a legatee, without specifying in the will the purposes of the trust, and at the same time communicates this purpose to the legatee orally or by unattested writing, and the legatee either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud, by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise.

D. M. Delmas, for the appellant.

Smith, Wright, and Pomeroy, and D. William Douthitt, for the respondent.

McFARLAND, J. Madeline Curdy died February 9, 1877, in Alameda County, California. She left a will duly executed, in which, after bequests to several persons, including the plaintiff herein, there occurs the following: "I give in trust to Francis Berton, now Swiss consul in San Francisco, all the moneys I possess in France, and principally my share of the Italian *rentes*, deposited in the banking-house of Messrs.

Hentsch, Lutscher, & Co., of Paris, to be distributed according to the private instructions I give him." Berton was present when the will was made, and wrote it for the testatrix at her request; and at the time of the making of the will she verbally instructed him to distribute said property or its proceeds to certain relations and others in France, other than the plaintiff herein, and gave him an order for said property. The facts in proof show that he at least impliedly agreed to accept the trust. After her death, and before the commencement of this action, said Berton faithfully distributed said property in accordance with the said instructions of said testatrix. This action is brought by plaintiff, a brother of the deceased, and one of her heirs at law, to have it decreed that Berton held the legal title to said property in trust for the heirs of said deceased, for an accounting, and for the payment to him of his proportionate share of said property, with interest, profits, etc. Francis Berton died during the pendency of the action, and his executor, George A. Berton, was substituted as defendant. The court gave judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial.

Upon the main point in the case the position of appellant is, in brief, that as the statute law of this state requires a will to be in writing, therefore, "where a testator devises property in trust to be applied to such uses as the testator has verbally specified to the devisee, the trust attempted to be created by parol fails, and the devisee takes the property in trust for the heirs of the testator." The contention of respondent is, in brief, that, independent of the statute of wills, where a testator bequeaths property in trust to a legatee, without specifying in the will the purposes of the trust, and at the same time communicates those purposes to the legatee orally, or by unattested writings, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, there a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud, by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise. We think that respondent's view of the law, as above stated, is correct. There are some cases which support the proposition of appellant,

notably the case of *Olliffe v. Wells*, 130 Mass. 221; but the weight of authority and the better reason are the other way.

Obviously, the clear intention of the testatrix, as expressed in the written will, was that the property in question should not go to plaintiff. He, however, says, in effect: "True, the property was not to come to me. It was given to Berton upon the understanding, between him and the testatrix, that it was to go to the benefit of certain other persons; but as they cannot establish their rights as beneficiaries, according to the statute of wills, Berton must be held to be my trustee, against the intention of the testatrix. I stand upon what I claim to be the dry law." Evidently, in a doubtful case, no just impulse would move a court to lean towards a proposition involving such consequences; and as the question is an open one in this state, we are at liberty to follow those authorities and that line of reasoning which appear to us to be most in consonance with the true principles of equity and justice.

We find in the *Will of O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53, a very full statement of the considerations which in our opinion ought to govern the decision of the case at bar. In that case, the testatrix by her will practically disinherited her relations in favor of strangers, giving the bulk of her estate to three legatees, who were her lawyer, her doctor, and her priest. The will was attacked by the heirs, on the ground of want of testamentary capacity and undue influence. As there was considerable evidence to support these charges, the legatees finally, to establish some reasonable explanation of a diversion of the estate to strangers having influence from confidential relations, showed that they were not to have any beneficial interest in the estate, but were to devote it entirely to certain charitable uses, according to instructions given them by the testatrix at the time the will was made.

It appeared, however, that these charitable uses were in direct violation of the statute law of the state. The heirs at law then began an action in equity to establish a trust, which, failing as to the intended beneficiaries on account of illegality, should result to them. The legatees then, although intending to carry out the wishes of the testatrix, stood upon their rights under the terms of the will, which upon its face gave them the property absolutely; denied that they had accepted any trust, or that any could be proven by extrinsic matter lying outside the will; and insisted that the property was theirs absolutely.

The question thus presented was, in substance, the one pre-

sented here. The only difference is, that in the O'Hara case the instructions were in writing, while in the case at bar they were oral. But neither in the argument of counsel nor in the opinion of the court was there any distinction made between written and oral instructions or promises. The principles announced applied equally to both. There was no claim that the letter of instructions came within the rule that an extraneous paper may be incorporated into a validly executed will by a direct reference to it in the will itself. There was no reference whatever in the will to the letter. The court in the O'Hara case, after stating that "the proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions," proceeds to discuss the question whether or not one of the legatees, McCue, expressly promised to accept the trust. After reviewing the evidence (which was somewhat contradictory) on that point, the court says: "Where, in such case, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him, to be applied by him to the benefit of others, it has all the force and effect of an express promise: *Wallgrave v. Tebbs*, 2 Kay & J. 321; *Schultz's Appeal*, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud: *Russell v. Jackson*, 10 Hare, 204." The court then proceeds to state the principles which should determine the main question under discussion, as follows: "If, therefore, in her letter of instruction, the testatrix had named some certain and definite beneficiary capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts, in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the deviser, which equity will not endure. The authorities on this point are numerous. [Here follows a long list of cases.] The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state: *Brown v. Lynch*, 1 Paige, 147; *Williams v. Fitch*, 18 N. Y. 546.

In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval, and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert*, 102 Mass. 40; 3 Am. Rep. 418. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement, while repudiating its obligation under cover of the statute.'" The other parts of the opinion discuss the question whether, as the charitable uses could not be enforced because forbidden by the statute, the legatees could be held as trustees for the heirs, but that question does not arise in the case at bar.

We have thus referred at length to the O'Hara case, because it contains a lucid statement of the principles which apply to the case at bar, and for the additional reason that in the opinion of the court and the briefs of counsel nearly all the authorities bearing upon the question are cited. We also refer especially to the case of *Williams v. Vreeland*, 32 N. J. Eq. 135, which declares the doctrine above stated; and in the notes to which are collated extracts from about forty different cases, all of which are confirmatory of said doctrine. See also *Hooker v. Axford*, 33 Mich. 453; *In re Fleetwood*, L. R. 15 Ch. D. 594; *In re Boyes*, L. R. 26 Ch. D. 531; and *Riordan v. Banon*, 10 Ired. Eq. 469. The cases cited will show that it is immaterial whether the instructions given by a testator are oral or in writing. Indeed, in the opinion of the court in the O'Hara case (above quoted), where the phrase "lying in parol, or unattested papers," is employed, the word "parol" is evidently used in its usual meaning as synonymous with "verbal" or "oral," and not in its broader meaning of "not under seal." The California cases of *De Laurencel v. De Boom*, 48 Cal. 581, *Estate of Shillaber*, 74 Id. 144, and *Estate of Brooks*, 54 Id.

475, while in harmony with the principles above stated, are not directly to the point involved in the case at bar. Our conclusion is, that the court below correctly decided that Francis Berton, deceased, properly distributed the property in France, in accordance with the instructions given him by the testatrix when the will was made, and which instructions he at that time agreed to carry out. Of course, the case must be distinguished from one where a testator, intending to give certain property directly to a certain person, for that person's sole benefit, fails to designate in the will either the property or the person. In such a case no question of trust could arise. These views make it unnecessary to determine the other two points made by respondent: 1. That the order for the property in France, given by the testatrix to Berton at the time the will was made, constituted a transfer of the property *in presenti*; and 2. That the action was barred by the statute of limitations.

The judgment and order are affirmed.

WILLS. — Where a testatrix, desiring to leave her estate for charitable purposes, and being advised that she could not effect her design by direct testamentary provision, but only by absolute gift to individuals, in reliance upon their honor to carry out her purpose, gave the greater part of her estate to her lawyer, her doctor, and her priest, by will, absolutely as joint tenants, they promising to carry out her instructions, the legatees took a trust estate, and not an absolute interest: *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 52.

FEENEY v. HOWARD.

[79 CALIFORNIA, 525.]

DEED ABSOLUTE ON ITS FACE CANNOT BY PAROL EVIDENCE BE SHOWN TO HAVE BEEN GIVEN IN TRUST for the benefit of the grantor in the absence of fraud, accident, or mistake, or a fiduciary relation between the parties.

FRAUDULENT INTENTION IS A MATERIAL INGREDIENT OF ACTUAL FRAUD, AND MUST BE ALLEGED as one of the facts constituting the fraud.

FRAUD. — **MERE FAILURE TO PERFORM A PAROL AGREEMENT** made in good faith is not fraud.

FRAUD — PLEADING. — **THE FACTS CONSTITUTING FRAUD MUST BE AVERRED IN CASES OF CONSTRUCTIVE** as well as of actual fraud; and if the pleader relies upon fiduciary relations of the parties as one of the elements of constructive fraud, he should aver it.

RECITAL OF CONSIDERATION IN A DEED CANNOT BE DISPROVED for the purpose of raising a trust or defeating the operation of the instrument, in the absence of fraud or mistake.

STATUTE OF FRAUDS IS NOT WAIVED BECAUSE NOT SPECIALLY PLEADED.

It is sufficient for the defendant to deny the alleged agreement without making any reference to the statute. The agreement being denied, the plaintiff must produce legal evidence of its existence.

R. Percy Wright, for the appellant.

J. C. Bates and Clara S. Foltz, for the respondent.

HAYNE, C. Suit to declare a trust. The material facts are as follows: One Catherine Feeney and the plaintiff, Michael Feeney, were tenants in common of a certain tract of land. She died, and Michael Feeney was appointed her administrator. He made two deeds to the defendant, Howard, which were dated on the same day, and purported to convey the same property, and recited a valuable consideration. One of these deeds was made by Michael Feeney, as administrator of Catherine Feeney, and the other by him in his individual capacity. Howard subsequently conveyed the property to trustees to secure a debt to the San Francisco Savings Union, and this debt not having been paid, the trustees sold the property, and after satisfying said debt, have a certain balance in their hands, which they are ready to pay to the person entitled thereto. The controversy relates to this balance. Michael Feeney, in his lifetime, commenced the present suit in his own name (not as administrator) to have it declared that he was entitled to said balance. On the trial, he introduced in evidence the deeds above mentioned, and then offered parol evidence to prove that they were without consideration, and that the property was conveyed to Howard upon certain trusts, and was to be reconveyed on request. Howard objected, on the ground of the statute of frauds. The parol evidence was admitted against such objection, to which Howard excepted; and judgment was given for the plaintiff, from which, and from an order denying a motion for a new trial, the appeal is taken. Subsequently to the appeal, Michael Feeney died, and his administrator was substituted.

It is to be observed that since Michael Feeney did not sue as administrator, no question as to the rights of the estate is involved. His deed as administrator may, therefore, be dismissed from consideration. The question to be determined is, whether, as between Michael Feeney and his grantee, a trust can be established in the manner attempted.

1. Unless the case can be brought within some one of the exceptions hereinafter noticed, we think that it is clear that

the statute of frauds is a defense to the action, and that the parol evidence was improperly admitted. If a trust could be raised in such a way, what operation could the statute of frauds ever have? The authorities are overwhelming to this effect.

In the case of *Rasdell v. Rasdell*, 9 Wis. 350, the ancestor of the plaintiff conveyed certain real property to the defendant; and it was sought to be shown that the transfer was without consideration, and upon a parol agreement to reconvey upon request. But the court held that this could not be done; and Paine, J., delivering the opinion, said: "We do not feel called upon to cite authorities to show that, in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor; and we have not been able to find anything in the case to make it an exception. We cannot see why, if this evidence is to be received to establish this trust, every other deed in the state may not be shown by parol to have been given upon trust, and the statute of frauds be entirely annulled." And there are numerous authorities to the same effect: See *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242; *Sturtevant v. Sturtevant*, 20 N. Y. 30; 75 Am. Dec. 871; *Wheeler v. Reynolds*, 66 N. Y. 227; *Titcomb v. Morrill*, 10 Allen, 15; *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471; *Fouty v. Fouty*, 34 Ind. 433; *Perry v. McHenry*, 13 Ill. 227; *Burden v. Sheridan*, 36 Iowa, 125; 14 Am. Rep. 505; *Morrall v. Waterson*, 7 Kan. 199; *Lawson v. Lawson*, 117 Ill. 98; *Dean v. Dean*, 6 Conn. 284; *Walker v. Locke*, 6 Cush. 90; *Boyd v. Stone*, 11 Mass. 342; *Metcalf v. Brandon*, 58 Miss. 842; *Bonham v. Craig*, 80 N. C. 224; *Donohoe v. Mariposa Co.*, 66 Cal. 327. In some of these instances, the case might possibly have been taken out of the statute on the ground of a fiduciary relation, but that feature did not receive attention.

Then, can the case be brought within any of the recognized exceptions to the above general rule? We do not think that it can.

(a) The counsel for the defendant is in error when he contends that the case presents features of actual or constructive fraud. No actual fraud was alleged. A material ingredient of actual fraud is the fraudulent intent, and this must be alleged as one of the facts constituting the fraud: *Moss v. Riddle*, 5 Cranch, 351. And if it be assumed, for the purposes of the opinion, that there may be cases where a fraudulent intent

would necessarily be inferred from the allegation of certain facts, and that a sale by an administrator without consideration would be such a case, yet this would not help the respondent in this regard; for, as above stated, neither the right of the estate nor the administrator's deed is involved here. No actual fraud is alleged, found, or shown by the evidence. For all that appears to the contrary, Michael Feeney's deed may have been given and received in entire good faith. The mere failure to perform a parol agreement which was made in good faith is not fraud: *Lawrence v. Gayetty*, 78 Cal. 131; *ante*, p. 29; *Perry v. McHenry*, 13 Ill. 236; *Wheeler v. Reynolds*, 66 N. Y. 234; *Burden v. Sheridan*, 36 Iowa, 125; 14 Am. Rep. 505; *Boyd v. Stone*, 11 Mass. 348; *Rasdell v. Rasdell*, 9 Wis. 356, 357.

Nor does any constructive fraud appear. It is true that it was held in *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, that if by means of a parol promise to reconvey a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform. And this case was approved in *Broder v. Conklin*, 77 Cal. 330. But it is essential to the operation of this principle that there be a fiduciary relation. It is one of the facts constituting the fraud. The facts constituting fraud must be averred in cases of constructive as well as of actual fraud: *Golson v. Dunlap*, 73 Id. 164. And in this case no fiduciary relation is averred. The counsel for the respondent suggests in his brief that the defendant was the son-in-law of the plaintiff, and reposed personal confidence in him. But if it be assumed that this would make a difference, it is sufficient to say that it nowhere appears in the record that defendant was the son-in-law of the plaintiff, and that nothing in relation to actual trust or confidence is averred in the complaint. We are not saying that a trust might or might not arise out of the violation of actual trust and confidence, independent of any fiduciary relation. We simply say that no such question can arise under the pleadings in this case.

(b) There was not a resulting trust. It is not necessary to consider whether the old rule that a trust results where a deed is made without consideration, either expressed in the deed or proved *aliunde*, prevails at present (compare Civ. Code, sec. 1040); for the deed recited a consideration. And although

there are certain collateral purposes for which such a recital can be contradicted, it cannot, in the absence of fraud or mistake, be contradicted between the parties for the purpose of defeating the operation of the instrument or raising a trust: *Russ v. Mebius*, 16 Cal. 356; *Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 412, 413.

(c) The position that there was part performance sufficient to take the case out of the statute cannot be sustained. Whatever was done by Howard the deed gave him a right to do. And to say that the deed itself, or what was done under it, is part performance, is merely to reassert in another form that the parol agreement was sufficient to raise the trust: Compare *Alderson v. Madison*, L. R. 7 Q. B. Div. 178; 8 App. Cas. 467.

It is not pretended that the transaction was a mortgage, nor is any other ground suggested which would constitute an exception to the general rule. We have carefully examined the numerous cases in our reports bearing upon the subject, and find that all proceed upon some recognized exception, and that none conflict with the rule above laid down.

2. The statute of frauds, however, was not pleaded. The defendant simply denied the alleged agreement and trust, but made no reference to the statute. And it is contended for the respondent that the statute was therefore waived, and that the appellant is not in a position to avail himself of it. As there has been some confusion on this subject, we have examined it with some care.

The notion that the statute must be specially pleaded is derived from the old chancery practice. In the English court of chancery the usual course was to plead the statute specially. The function of pleadings in chancery, however, was somewhat different from that of pleadings at law. In the language of Story, "a bill in chancery is not only a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which the plaintiff's right to relief rests, but it is also in most cases an examination of the defendant upon oath for the purpose of obtaining evidence to establish the plaintiff's case, or to counterprove or destroy the defense which may be set up by such defendant in his answer": Story's Eq. Pl., sec. 268. If in response to such a bill the defendant confessed the making of a parol agreement, but pleaded the statute as a bar to relief, the defense was good: 2 Story's Eq. Jur., sec. 757. But if he confessed the parol agreement, and did not insist upon the statute,

he was regarded as having waived it: *Id.*, sec. 755. But it was not necessary for the defendant to confess the agreement. It became settled, after some conflict of opinion, that he could plead the statute as a bar to the discovery of the parol agreement as well as to its performance: Story's Eq. Pl., sec. 763. And inasmuch as a denial of the agreement would subject him to a conviction of perjury (see 1 Sugden on Vendors, 7th Am. ed., p. 158, c. 4, sec. 6, par. 12), it was natural that the usual course was to plead the statute as a bar to both discovery and relief. But it is not entirely clear whether a denial of the contract without pleading the statute was sufficient to enable the party to take the objection at the hearing. That it was, is distinctly stated by Lord Cranworth in *Ridgway v. Wharton*, 8 De Gex, M. & G. 689; and compare *Fell v. Chamberlain*, 2 Dickens, 484, and Sugden on Vendors, *supra*. But this case is somewhat discredited by *Heys v. Astley*, 4 De Gex, J. & S. 84.

At law it is clear that the denial of the contract was sufficient to let in the defense: *Buttemere v. Hayes*, 5 Mees. & W. 461; *Eastwood v. Kenyon*, 11 Ad. & E. 445. And this was not put upon any distinction between cases where the plaintiff declared specially and cases where he resorted to the common counts. The defendant, however, was at liberty to plead the statute specially if he saw fit to do so: 1 Chitty on Pleading, *528. The rule that it was sufficient at law to deny the contract seems to have continued in force until the new judicature acts, by which it was expressly provided that "when a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise": See Andrews and Stoney's Judicature Acts, 4th ed., p. 197.

The common-law rule that it was sufficient to deny the contract has been sanctioned in America by high authority. Thus in *Dunphy v. Ryan*, 116 U. S. 495, which went up from Montana, the defendant in an action at law set up a counterclaim or cross-action based upon an agreement which was not alleged to be in writing, and the plaintiff filed a replication denying such contract, and it was held that this was sufficient to raise the question, the court saying: "The denial in the replication of the plaintiff of the making of the contract, on which the defendant based his cross-action, is as effective for

letting in the defense of the statute of frauds as if the statute had been specifically pleaded": See also *Birchell v. Neaster*, 36 Ohio St. 381. And even in states where the chancery rule that the statute must be specially pleaded seems to prevail, it has been held that so far as the common counts are concerned it is sufficient to plead the general issue: *Durant v. Rogers*, 71 Ill. 124; and see also *Hunter v. Randall*, 62 Me. 426; 16 Am. Rep. 490; *Boston Duck Co. v. Dewey*, 6 Gray, 446.

In New York, where the phraseology of the statute of frauds is similar to ours, the common-law rule of pleading is applied even in equity. This view was announced in *Cozine v. Graham*, 2 Paige, 181. That case arose on a demurrer to a complaint which did not show whether the contract was in writing or not. The demurrer was overruled upon the ground that the contract must be presumed on demurrer to have been in writing. But Chancellor Walworth, in the course of his opinion, said: "The rule of pleading on this subject is well settled in the courts of law, and I do not see why the principle of that rule is not applicable to this court. It is there held that the statute did not alter the form of pleading; that if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied, the plaintiff must produce legal evidence of its existence." This case is a leading one in that state, and upon its authority it has always been held there that it is sufficient as a matter of pleading to deny the contract: See *Ontario Bank v. Root*, 3 Paige, *481; *Coles v. Bowne*, 10 Id. 535; *Chaplin v. Parish*, 11 Id. 408; *Harris v. Knickerbacker*, 5 Wend. 638, 344; *Botts v. Cozine*, 1 Hoff. Ch. 89; *Duffy v. O'Donovan*, 46 N. Y. 226.

The case of *Bommar v. American S. H. M. Co.*, 81 N. Y. 471, is not at all in conflict with the foregoing. In that case Rapallo, J., said, in reply to an argument upon the statute of frauds: "There is no exception in the case raising any question under the statute of frauds. The statute is not pleaded, nor was there any objection to the proof of the agreement sued upon, by oral testimony, nor is there any exception to any finding or conclusion which presents any question under the statute. No such question can, therefore, be considered on this appeal." This is merely the statement of the very obvious proposition that the record on appeal must show in some way that a question as to the statute of frauds is involved in

the case. And the implication is, that this might be shown in any of the ways mentioned. Nor have we seen any New York case which is in conflict with the rule that a denial of the contract is sufficient to raise the question of the statute of frauds.

This rule is applied by the supreme court of the United States, not only at law, as appears from the cases above cited, but even in equity: See *May v. Sloan*, 101 U. S. 237. And it is so applied in many of the state courts: See *Wiswell v. Tefft*, 5 Kan. 266; *Whiting v. Gould*, 2 Wis. 593, 594; *Patten v. Rucker*, 29 Tex. 411; *Walker v. Hill*, 21 N. J. Eq. 203; *Billingslea v. Ward*, 33 Md. 51; *Semmes v. Worthington*, 34 Id. 317; *Hocker v. Gentry*, 3 Met. (Ky.) 474; *Brown v. East*, 5 T. B. Mon. *48; *Wynn v. Garland*, 19 Ark. 34; 68 Am. Dec. 190; *Pray v. Sandifer*, 5 Rich. Eq. 180; *Hook v. Turner*, 22 Mo. 333; *Rowton v. Rowton*, 1 Hen. & M. 91; *Bonham v. Craig*, 80 N. C. 228. And in some of the states which maintain the contrary doctrine it is admitted that the prevailing rule in this country is, that a denial is sufficient: See *Battell v. Matol*, 58 Vt. 285.

In California, two cases on the subject have been called to our attention. In *Osborne v. Endicott*, 6 Cal. 153, 65 Am. Dec. 498, one of the objections to establishing a parol trust as to the real property was, that there was no writing. The court held that the trust was a resulting trust, and therefore not within the statute, but said in addition that the point as to the statute was not good, "because the statute of frauds is not pleaded." That was all that was said on the subject. No reason was given for the remark of the court, and no authorities were referred to. This case was referred to in *Broder v. Conklin*, 77 Cal. 336, but in such a manner as to show that no reliance was placed upon it.

In *Burt v. Wilson*, 28 Cal. 638, 87 Am. Dec. 142, an amended complaint to establish a trust alleged as a reason why the trust should be established, that in the answer first filed (which had been withdrawn) the trust was admitted. The court replied, as well it might, that the position was not tenable, "for a number of reasons"; and the reason which it selected from among the number was, that there was no admission, because it was not alleged that said answer did not contain a plea of the statute of frauds, which it might have done. It is hardly necessary to say that this does not conflict with the proposition that if the defendant denies the con-

tract he need not plead the statute specially. In the subsequent case of *Wakefield v. Greenhood*, 29 Cal. 599, 600, the court stated the rule to be as follows: "If the contract stated in the declaration or bill in equity was denied, it was incumbent upon plaintiff or complainant to prove by legal evidence its existence, and this could be done only by the production of proof of the execution and contents of the written agreement, or some note or memorandum thereof executed according to the provisions of the statute of frauds." And compare *Patten v. Hicks*, 43 Cal. 509.

We think it clear upon principle that under our statute of frauds and system of pleading it is sufficient to deny the contract without referring to the statute. The old chancery idea that the statute must be specially pleaded grew out of and is based upon the assumption that a parol contract within the statute had some kind of validity. And one of the objects of the pleadings in chancery being for the discovery of evidence, we can readily see how the doctrine arose. But our statute declares, not merely that no action shall be maintained upon contracts within its operation, but that they are "invalid." A parol contract within such a statute is void: *Dung v. Parker*, 52 N. Y. 496, 497; *Dunphy v. Ryan*, 116 U. S. 495; *Welch v. Whelpley*, 62 Mich. 15; 4 Am. St. Rep. 810; *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619. And to require the defendant to show affirmatively the invalidity of the plaintiff's contract would be out of harmony with the general rules of pleading and practice.

It may be that it would simplify matters if the plaintiff were required to state in his complaint whether he relies upon a writing or not. For then the question could always be raised at a preliminary stage of the case. But it has been decided that this is not required: *Wakefield v. Greenhood*, 29 Cal. 599. And since this is so, and the question may be adjourned to a subsequent state of the proceedings, we do not see why the burden of allegation should be thrown upon the defendant when the thing is an essential element of the plaintiff's case.

Furthermore, under our system the pleader is to allege facts only, avoiding matters of evidence on the one hand and matters of law on the other; and when he states a fact once, either affirmatively or negatively, it is sufficient for that pleading: *Green v. Palmer*, 15 Cal. 417; 76 Am. Dec. 492. Therefore, when the plaintiff alleges a contract which is either stated or presumed to be in writing, it is sufficient for the

defendant to deny such contract. Having denied it, he is not required to state affirmatively that it was not in writing, or to refer in his answer to the law which makes it invalid. If the statute of limitations constitutes an exception to the rule that matters of law must not be pleaded, it is only an exception to a general rule. But it is quite a different matter. It is not an element of the plaintiff's case. Nor does it render the contract void: *McCormick v. Brown*, 36 Cal. 184; 95 Am. Dec. 170; *Grant v. Burr*, 54 Cal. 300. And the statutory mode of pleading it is simply a short way of averring the time of the transaction.

If the rule that the statute must be specially pleaded is to prevail in this state because it prevailed in the English court of chancery, then, to be consistent, we should say that for the same reason pleadings here should be of matters of evidence to the extent that was proper there. To our minds, the rule of the common law which prevails in the majority of American courts, even in equity, is the true one.

The bill of exceptions was in time. The other matters do not require special notice.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

VANCLIEF, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

STATUTE OF FRAUDS — PLEADING. — The statute of frauds, as a defense, must be pleaded, or it will be waived, even though it is brought out in the evidence: *Espalla v. Wilson*, 86 Ala. 487. A general replication waives the statute of frauds as a defense against an agreement set up in the answer: *Tarleton v. Vietes*, 1 Gilm. 470; 41 Am. Dec. 193, and note 196. The defendant must either deny an agreement or plead the statute when he seeks to avail himself of the benefit of the statute of frauds: *Talbot v. Bowen*, 1 A. K. Marsh. 463; 10 Am. Dec. 747. The statute of frauds must be specifically pleaded, unless the circumstances are such that it can be made available as a defense by way of demurrer: *Switzer v. Skills*, 3 Gilm. 529; 44 Am. Dec. 723; *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190. A defendant waives the benefit of the statute of frauds by admitting the contract sued on and failing to specifically plead the statute: *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; note to *Houser v. Lamont*, 93 Am. Dec. 758. But in *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679, that the defense of the statute of frauds may be shown under the general issue, or pleaded specifically, at the option of the defendant; and see ex-

tended note to the same case as to when and how the statute must be pleaded.

DEEDS — PAROL TESTIMONY. — Parol testimony cannot change an absolute deed into one of trust, unless there is some fraud, accident, and mistake: *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471, and note; *Sturtevant v. Sturtevant*, 20 N. Y. 39; 75 Am. Dec. 371, and cases cited in note 372; *Burden v. Sheridan*, 36 Iowa, 125; 14 Am. Rep. 505; because express trusts cannot be created except by writing: *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242, and note 245, as to creation of trusts by parol: *Mossley v. Mossley*, 86 Ala. 289; *Wright v. Moody*, 116 Ind. 175.

FRAUD. — FRAUDULENT REPRESENTATIONS AVOIDING CONTRACTS: See *Lawrence v. Gayetty*, 78 Cal. 126; *ante*, p. 29, and note. As to how fraud should be pleaded, and what should be alleged, see *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345, and note.

PAROL EVIDENCE WITH RESPECT TO WRITTEN CONTRACTS and instruments of writing in general, with recent cases in relation thereto, see extended note to *Sullivan v. Lear*, 11 Am. St. Rep. 393-395; extended note to *Cornwall etc. R. R. Co.'s Appeal*, 11 Am. St. Rep. 893, 894; note to *Real Estate etc. Co.'s Appeal*, 11 Am. St. Rep. 922.

[IN BANK.]

OULLAHAN v. SWEENEY.

[79 CALIFORNIA, 537.]

RETROSPECTIVE LAWS. — Statute providing that purchaser of property sold for delinquent taxes must, thirty days before the expiration of the time of redemption, or before he applies for a deed, serve a notice setting forth the sale, the amount due, stating when the time for redemption will expire, or when he will apply for the deed, and extending the time for redemption indefinitely until such notice is given, is constitutional, and applies to sales previously made.

Wright and Hazen, for the appellant.

Stonesifer and Minor, for the respondent.

HAYNE, C. Ejectment; judgment for defendant; plaintiff appeals. The case turns upon the validity of a tax deed, under which the plaintiff claims. The deed was made without any notice to the owner, as required by section 3785 of the Political Code. The sale was made in February, 1885, at which time the law was, that a redemption could be made in twelve months, and if not made within that time, the purchaser could obtain his deed without giving notice to the owner. But by an amendment passed in March, 1885, it was provided that "the purchaser of property sold for delinquent taxes, or his assignee, must, thirty days previous to the expiration of

the time for redemption, or thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice stating that said property or a portion thereof has been sold for delinquent taxes; giving the date of the sale, the amount of the property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely until such notice shall have been given and said deed applied for, upon the payment of the fees, percentages, penalties, and costs, as provided by law": Pol. Code, sec. 3785.

We think that this amendment was intended to apply to all applications for deeds after it took effect. The counsel argue, however, that it was not within the power of the legislature to extend the time for redemptions on sales previously made, because they say such an extension impairs the validity of a contract. It may be assumed, for the purposes of the case, that the legislature cannot make an absolute extension of the time for redemption of property previously sold. But this has not been attempted to be done by the provision in question. The purchaser may still obtain his deed at the expiration of twelve months, provided he takes the proper proceedings. If he does not take them, it is his own fault, and he alone is responsible for the consequences. The question, therefore, is, whether the legislature had the power to require notice to be given of applications for deeds of sales made before the passage of the law. This precise point was decided in *Curtis v. Whitney*, 13 Wall. 68, in which the court upheld the validity of the law. We think that this decision is sound in principle. The change affected the remedy merely, which was within the control of the legislature: See, generally, *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 516; *Moore v. Martin*, 38 Id. 428.

We therefore advise that the order appealed from be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

STATUTES, RETROSPECTIVE. — The prohibition upon *ex post facto* laws applies only to such retrospective laws as relate to crimes and penalties: *Dash v. Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291. Compare note to *Baughner v*

Nelson, 52 Am. Dec. 694, as to when retroactive laws will be allowed to operate. See *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116, which is a very similar case to the principal case.

The point discussed in the principal case was concerning the constitutionality of the statute, assuming as proper the construction given to it by the court. Whether the language of the statute warranted its application to sales previously made was the serious question in the case. The assumption indulged by the court was unwarranted. There is nothing in the statute to indicate that its retrospective operation was intended; and the authorities all agree that a statute ought never to be applied retrospectively in the absence of language making such application imperative: Sedgwick on Statutory and Constitutional Law, 2d ed., p. 161; and the very code of which the statute was a part declares of itself that "no part of it is retroactive, unless expressly so declared": Cal. Pol. Code, sec. 3. In the case of *Curtis v. Whitney*, 13 Wall. 68, referred to in the principal case, the statute in express terms purported to apply to sales previously made.

[IN BANK.]

FARNUM v. HEFNER.

[79 CALIFORNIA, 575.]

FORFEITURE OF LEASE DOES NOT RESULT FROM AN INVOLUNTARY TRANSFER OF THE LEASEHOLD INTEREST, as by sale under execution, — bankruptcy or the like, — though the lease contains a covenant that the lessee will not underlet any part of the premises nor assign the lease without the written assent of the lessor. If the landlord desires to avoid any such involuntary transfers, he may provide expressly that such a transfer of the property shall work a forfeiture.

THOUGH A LEASE SHOWS THAT IT IS THE INTENTION OF THE PARTIES THAT THE TENANT SHALL HIMSELF OCCUPY THE PREMISES, it will not be forfeited by a sale of his interest under execution.

A LEASE CANNOT BE FORFEITED BY A WRITTEN AGREEMENT OF FORFEITURE EXECUTED BY THE TENANT AFTER AN EXECUTION LIEN HAS ATTACHED, because the sale under such lien will relate back to its inception, and thus transfer the lessee's title as of a date anterior to such forfeiture.

TENANT HAS AN INTEREST SUBJECT TO EXECUTION IN WHEAT RAISED BY HIM UNDER A LEASE, in which he agrees, after thrashing and harvesting such wheat, to deliver the whole thereof to the lessor, and the lessor agrees upon such delivery that he will immediately deliver and transfer two thirds of the same to the lessee, and that until such delivery said wheat shall be the property of the lessor, and the lessee shall have no right to dispose of or to encumber any portion thereof.

H. V. Reardan, for the appellant.

Carter P. Pomeroy, for the respondent.

WORKS, J. Action to recover damages for the conversion of a lot of wheat. Judgment for the plaintiff, from which, and an order denying his motion for a new trial, the defendant appeals.

The respondent, being the owner of certain real estate, leased the same to one Butler for a term of years. The lease contained the following covenants:—

“And the said party of the second part does hereby covenant and agree that he will not underlet any portion of said premises nor assign this lease without the written permission of the said party of the first part, his agent or attorney, and he will, during the said term of lease, keep the buildings, corral, and other improvements now on said premises, or which may be put thereon during the terms of this lease by the said party of the first part, in good repair, damages or loss by fire excepted; that he will not commit or suffer waste to be committed thereon; and the said party of the second part further covenants that he will, in good and farm-like manner, at his own cost, charge, and expense, till and cultivate the said premises as follows, and not otherwise, to wit: That in due and proper season in the fall of 1884, he will plow to the depth of four inches or deeper, and sow to wheat, the east one half of said premises, and in due and proper season in the spring of 1885, he will plow to the depth of four inches or deeper the west one half of said premises, and sow the same to wheat in the fall of 1885; that he will, at his own cost, charge, and expense, well and carefully tend, take care of, and protect the crops while growing on said premises during said term of this lease; and that as soon as the same is suitable for harvesting, he will without delay, and at his own cost, charge, and expense, harvest, thrash, glean, and sack in good and new merchantable sacks, all the grain raised on said premises; and as soon as thrashed and sacked, deliver to said party of the first part, his agent or attorney, without charge, all of the grain, one third thereof, quality and quantity considered, to be delivered in the town of Biggs, in Butte County, California, and the remaining two thirds to be delivered on the said premises.

“And the said party of the first part hereby covenants and agrees, that upon said wheat or hay, or wheat and hay, being delivered as aforesaid, he will immediately deliver and transfer to the said party of the second part two thirds of said wheat or hay, quality and quantity considered.

“And it is mutually covenanted and agreed that until such delivery and transfer by the said party of the first part, all of said wheat and hay shall be the property of the said party of

the first part, and the said party of the second part shall have no right to dispose of or encumber any portion thereof."

The appellant brought his action and recovered a judgment against Butler, the tenant, and levied his execution upon this leasehold interest in the respondent's property. After the levy of said execution, and while the lien thereof was in force, the tenant executed to the respondent the following acknowledgment of forfeiture of the lease:—

"Whereas, on account of financial embarrassment, I am unable to perform my obligations under a certain lease made by C. E. Farnum to myself on the fifteenth day of October, 1884, in the city and county of San Francisco, California, to [describing the property], and having already, to the detriment of the said C. E. Farnum, committed breach of covenant of said contract; and whereas said C. E. Farnum demands forfeiture of said lease or contract, in order to secure himself from loss on account of such breach of contract,—now, therefore, in consideration of the foregoing, I hereby forfeit to the said C. E. Farnum the said lease or contract with all my rights under it."

The appellant proceeded to enforce his judgment and execution lien by a sale of the property on such execution, and himself became the purchaser. He entered upon the lands under his purchase, and proceeded to harvest the wheat growing on the land. While so in possession, he was notified by the respondent to give possession of the property, and forbidden to harvest the grain. After having harvested and thrashed the grain, he tendered to the agent of the respondent the wheat, as provided in the lease. One Frank Hefner, a son of the appellant, testified as follows with reference to the delivery of and offer to deliver the wheat:—

"When I had cut and sacked the grain I visited Biggs, and notified Mr. Robinson (respondent's agent) that the grain was ready for delivery, and requested him to name the place where I should deliver it. He refused to name the place, and refused to make any division of the grain. I thereupon hauled all of the grain to Biggs and deposited it in the warehouse, had it weighed and divided, and deposited two thirds of it under one receipt, and one third under another. I again called upon Mr. Robinson and informed him that all of the grain was at the warehouse, and tendered him the receipt for one third of it, which he at first refused to accept, but in a short time concluded to and did accept the one third."

Mr. Robinson testified as follows: "After the grain was cut and sacked, Mr. Frank Hefner, the son of the defendant, called upon me at Biggs and notified me that the grain had been cut and sacked and was ready for delivery, and requested me to designate where it should be delivered, and also to make division. I refused to accept the grain unless it was delivered free from any claim by Mr. Hefner for any part of it. Afterward Mr. Frank Hefner notified me that the grain had all been delivered at the warehouse at Biggs and weighed, and tendered me the warehouse receipt for one third of said wheat. I at first refused to receive it, but afterward accepted and received it."

At the trial the appellant offered in evidence the judgment roll in the action of himself against Butler, under which the leasehold interest of Butler was sold. Objection was made to the evidence by the respondent, and the court below excluded it, and this is assigned as error.

The respondent contends that the ruling of the court was right, on three grounds: 1. The transfer of the leasehold interest by the execution sale to the appellant was an assignment within the terms of the lease, and worked a forfeiture thereof; 2. The lease has been forfeited by the written acknowledgment of the tenant; 3. The tenant, under the provisions of the lease, had no interest in the crops harvested, and therefore no interest could pass to the appellant by the sale.

1. The first of these contentions presents the question whether an involuntary transfer of the leasehold interest of the tenant was in violation of the terms of the lease and worked a forfeiture of his estate. If so, the ruling of the court below was right. Otherwise, so far as this point is concerned, it was error. The covenant in the lease is the ordinary kind, which applies, it seems to us, to a voluntary, and not an involuntary, assignment of the lease. It is firmly established by authority that under such a covenant an involuntary assignment by sale under execution—bankruptcy and the like—is not a violation of the covenant, and does not work a forfeiture: 2 Greenl. Ev., sec. 245; Wood on Landlord and Tenant, 2d ed., p. 714; *Riggs v. Pursell*, 66 N. Y. 198; 1 Taylor on Landlord and Tenant, sec. 408; *Bemis v. Wilder*, 100 Mass. 446; *Jackson v. Silvernail*, 15 Johns. 277.

If the landlord desires to avoid such involuntary transfer of the leasehold interest of the tenant, he may provide expressly in his lease that such transfer of the property shall

work a forfeiture, and the same will be effectual: Taylor on Landlord and Tenant, sec. 409; *Davis v. Eytton*, 7 Bing. 154; *Doe v. David*, 5 Tyrw. 125; *Roe v. Galliers*, 2 Term Rep. 133.

So where it appears that the judgment and sale has been submitted to in bad faith on the part of the lessee, or where he voluntarily places himself in such a position that a transfer must result, as, for example, where he deposits the lease as security, or gives a warrant of attorney whereby he may be dispossessed by the creditor: *Doe v. Hawke*, 2 East, 553. But this is placed upon the ground that the assignment in such cases must be regarded as voluntary.

It is contended by counsel for respondent that where the whole tenor of the lease shows that it is the intention of the parties that the tenant shall himself occupy the premises, that the case is within the rule above laid down, and that the assignment under the circumstances of this case must be held to work a forfeiture, and cites a number of cases, only one of which, it seems to us, has any tendency to support the position taken: *Doe v. Clarke*, 7 East, 375. And in that case the court puts its decision upon the ground that the lease required as a condition that the tenant should actually occupy the dwelling-house on the premises, which, we think, presents an entirely different case from the one before us.

We are quite clear, from the authorities cited above, that the transfer of this property by the judgment and sale of the respondent did not forfeit the lease, and that the ruling of the court cannot be sustained on that ground.

2. As to the contention that the lease was forfeited by the written acknowledgment thereof by the tenant, it appears that such acknowledgment was executed after the lien of the respondent's execution had attached, and in our judgment a voluntary acknowledgment of forfeiture at that time could not affect the rights of the appellant, and that upon a sale of the property his title would relate back to the time of the levy of his execution as against such forfeiture. Again, it appears to us, from the record before us, that there was no consideration or reason for this acknowledgment of forfeiture, unless it were to avoid the just obligations of the tenant to the respondent. There is no evidence in the case, nor does it appear from the instrument itself, that there was any cause of forfeiture, or that the respondent could in any way be injured by reason of the proceedings of the appellant. Under such circumstances, it

seems to us that the forfeiture executed by the tenant must be held to be invalid as against the rights of the appellant.

3. We think the contention of the respondent that the tenant had no such interest in the wheat in controversy in this action as could pass by execution and sale does not reach the question presented. The tenant certainly had a leasehold interest in the property, under which he might, by complying with the terms of the lease, become the owner of the identical wheat raised upon the land. It is undoubtedly true, as contended, that the landlord and tenant may by agreement provide that all of the crops raised upon the land may be delivered to and remain the property of the landlord, and be disposed of by him, and such agreement will protect the title of the landlord in the property as against an attachment creditor of the tenant. But it will be found upon an examination of the cases cited by counsel that in every instance where such an agreement is upheld it is made for the protection of the landlord in case of advancements by him, or for some other reason; in other words, there is some consideration shown for the agreement by which the title remains in the landlord. And in none of the cases, so far as they have come to our notice, has it been held that such a rule can apply where the property, or a part of it, delivered to the landlord is to be immediately redelivered to and become the property of the tenant, as in this case: *Howell v. Foster*, 65 Cal. 169; *Smith v. Atkins*, 18 Vt. 461; *Paris v. Vail*, 18 Id. 277; *Briggs v. Oaks*, 26 Id. 138; *Esdon v. Colburn*, 28 Id. 631; 67 Am. Dec. 730.

There is no evidence in this case that there was any reason, so far as the liability of the landlord was concerned, that there should be any withholding of the crops raised upon the land for his protection; and the lease expressly provides that one third of the wheat shall be delivered to him at a certain place, and the other two thirds be delivered to the landlord on the land, and immediately redelivered by him to the tenant. It is not denied that the appellant, after his purchase, fully complied with the terms of the lease, cut and harvested the grain, tendered the delivery thereof to the agent of the respondent, who refused to receive the same unless the delivery was made free from any claim of the appellant. Conceding, as contended, that the title to the property remained in the respondent, still the tenant would have had the right to enforce the delivery of the grain to him under the terms of the

lease, and that right was one which would pass by the sale to the appellant, and upon a compliance by him with the terms of the lease, he was entitled to have the identical wheat raised upon the land delivered to him. And upon the refusal of the respondent, through his agent, to accept the wheat on the terms provided for in the lease, the appellant had the undoubted right to retain the wheat without a delivery in the first instance to him. The wheat being in his possession under these circumstances, it is quite clear to us that an action to recover the wheat, or for damages for its conversion by the appellant, cannot be maintained.

For these reasons, the court below erred in excluding the judgment roll, which was material to show that the appellant had become the owner of the interest of Butler.

It is also contended by the appellant that the court erred in admitting in evidence, over his objection, the written acknowledgment of forfeiture above set out. We are of the opinion, for the reasons above stated, that the acknowledgment was immaterial as against the appellant, whose rights had attached in the property before such acknowledgment had been executed and delivered.

Judgment and order appealed from reversed.

LANDLORD AND TENANT. — Under a lease providing that the farm produce is to be at the control of the lessor until sold, he can hold it against the lessee and his creditors; for the lessee has no interest in the crops while growing upon the land while he holds under such a lease: *Edson v. Colburn*, 28 Vt. 631; 67 Am. Dec. 730, and note 723.

[IN BANK.]

BROWN v. STARR.

[79 CALIFORNIA, 603.]

IN APPRAISING A HOMESTEAD IN PROCEEDINGS UNDER EXECUTION, it is the value of the premises, and not the defendant's estate therein, which must be considered. The quantity of land to be set off cannot be increased because the defendant's estate is for life only, or is for any reason less valuable than an estate in fee. If the premises can be divided without material injury, the life tenant cannot require that they be sold as an entirety, and that five thousand dollars of the proceeds be paid to him.

Wicks and Ward, for the appellant.

C. N. Wilson, for the respondent.

McFARLAND, J. Execution was issued upon a judgment in favor of plaintiff herein against L. C. Alexander *et al.*, and levied on land upon which Alexander had declared a homestead. Under sections 1245 et seq. of the Civil Code, persons were appointed by the court to appraise the value of the homestead. They reported that the property covered by the homestead was of the value of fifteen thousand dollars; that it could be easily divided, and that they had set off as a homestead a certain part of the land, including the dwelling-house of Alexander, and most of his improvements, which was of the value of five thousand dollars. Alexander claimed that he owned only a life estate in the land, or a "mere right of personal occupancy during his lifetime"; and he moved that the appraisement be remanded for another report, in which his said life interest only should be appraised, and that he be allowed to prove that he had only such interest. He also moved that the premises be sold as an entirety, and five thousand dollars of the proceeds paid to him. The court overruled said motions, and Alexander appeals from the orders denying said motions, and also from an order approving the report of the commissioners.

Assuming that said orders are appealable, we are satisfied that no error was committed by the court below. A homestead consists of "the dwelling-house in which the claimant resides, and the land on which the same is situated" (Civ. Code, sec. 1237), irrespective of the tenure, tenancy, or title by which he holds it. When an execution is sought to be enforced against it, the appraisers must "view the premises," and "appraise the value thereof,"—that is, the value of the premises; and if the value of the premises exceeds five thousand dollars, they must determine whether the land claimed can be divided without material injury: Sec. 1251. If from the report it appears to the judge that the land claimed can be divided, etc., he must "direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land": Sec. 1253. It is the land, including the residence, that "must amount in value," etc. There is no provision of the code on the subject of homesteads which makes any allusion to the title or kind of tenure by which the claimant holds the property, or requires any appraisement of the interest which he has therein. If he resides on the land, he may have a homestead on so much of it as does not exceed in value five

thousand dollars against any person except one who has a better title, no matter what his own title is; and when an execution creditor claims that he is holding as a homestead more than he is entitled to, that question must be determined by the value of the land. Any other rule would lead to infinite confusion. Can it be contended that a man can have and keep, and enjoy as a homestead, a large and valuable tract of land worth ten times the amount of exemption, and can prevent a creditor from having set off to him a part of the land, including his dwelling-house, of the value of five thousand dollars, because he claims only a life estate in the whole, and owing to the uncertainty of life, such estate might not bring a large sum at sheriff's sale?

The question here is not what title would a purchaser get if the property were sold. A purchaser at sheriff's sale never gets higher title than that held by the judgment creditor. Whenever it appears that a homestead claimant holds land of greater value than five thousand dollars, and a creditor seeks to subject the excess to his execution, the court must first find out, through appraisers, whether it can be "divided without material injury"; and if it can be so divided, and a part worth five thousand dollars set off to the claimant, that course must be pursued. That was the fact, and such was the course pursued in the case at bar, and there the proceedings properly ended. If large and valuable properties could be held as homesteads under the pretense that the claimants had less than titles in fee-simple thereon, schemes could easily be contrived with relatives and friends by which the machinery of the homestead law, designed for beneficent purposes, could be used as a means of dishonesty and fraud. These views are in entire accord with the cases of *Spencer v. Geissman*, 37 Cal. 99, 99 Am. Dec. 248, and *Brooks v. Hyde*, 37 Cal. 366.

The orders appealed from are affirmed.

HOMESTEAD. — The homestead right does not depend upon the character of claimant's title, but extends to whatever title he may have: *Spencer v. Geissman*, 37 Cal. 96; 99 Am. Dec. 248, and cases cited in note 250. But a rule contrary to that in the principal case was laid down in Missouri and New Hampshire: *Squire v. Medjet*, 63 N. H. 71; *State v. Mason*, 15 Mo. App. 141.

HOMESTEAD — INTEREST OR ESTATE OF CLAIMANT. — The husband, as the head of a family, can have a homestead in a life estate the title to which is in the wife: *Kendall v. Powers*, 96 Mo. 142. Homestead rights may attach to land when it is acquired, even though it is subject to encumbrances, legal or equitable, at the time when it is begun to be occupied as a homestead: *Reed v. Howard*, 71 Tex. 204.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

COUNTY COMMISSIONERS OF FRANKLIN COUNTY v.
STATE.

[24 FLORIDA, 55.]

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF STATUTE cannot be questioned by one whose rights it does not affect, and who has no interest in defeating it.

ELECTIONS — POWER OF CANVASSING BOARDS. — Boards of ministerial officers, authorized to canvass the result of elections and declare the result as shown by returns made to them by inferior boards, cannot pass upon the illegality of the election or of votes cast thereat, nor set up the same as ground for resisting *mandamus* brought to compel them to make such canvass.

ELECTIONS — DUTY OF CANVASSING OFFICERS. — A statute requiring inspectors of elections to canvass the votes cast, and “make due returns of the same to the county commissioners,” imposes, by implication, upon the latter the duty of receiving and filing such returns when so made into their official custody and keeping.

A PAPER IS FILED WHEN it is delivered to the proper officer and by him received to be kept on file; and the file-marks are but evidence of its having been filed. The duty of filing usually includes that of putting on such marks.

ELECTIONS — DUTY OF CANVASSING OFFICERS. — Where a statute merely requires certain commissioners to receive and keep in their official custody election returns, the performance of such duty involves no consideration by them of the legality of the election, nor does it permit them to raise the question of such legality on *mandamus* as a reason for not performing such duty; nor does the performance of such duty decide or conclude the legality of the election, but merely preserves the evidence of the result as shown by the returns.

John S. Beard and H. O. Hicks, for the plaintiffs in error.

D. S. Walker, Jr., for the defendants in error.

RANNEY, J. The act of June 2, 1887, providing for the enforcement of the local option, or nineteenth article of the constitution, makes it the duty of the inspectors of election appointed thereunder to canvass the vote cast and to make due returns of the same to the county commissioners of the county in which an election may be held.

The purpose of the proceedings in this case is to compel the commissioners of Franklin County to receive the returns of an election held in that county under said act (chapter 3700) on the twenty-third day of last August, and to file the same as public records and documents of the county. Nothing more is asked.

Article 19 of the constitution provides that the board of county commissioners of each county in the state, not oftener than once in every two years, upon the application of one fourth of the registered voters of any county, shall call and provide for an election in the county in which the application is made, to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited therein, the question to be determined by a majority vote of those voting at the election, which election, it provides, shall be conducted in the manner provided by law for holding general elections. It also provides that elections under it shall be held within sixty days from the time of presenting the application, but that if any such election should thereby take place within sixty days of any state or national election, it shall be held within sixty days after any such state or national election. By its provisions, intoxicating liquors, either spirituous, vinous, or malt, cannot be sold in any election district in which a majority vote was cast against the same at the said election; and "the legislature shall provide necessary laws to carry out and enforce the provisions" of the article.

The alternative writ was demurred to on two grounds, viz.: 1. That the statute under which the election was held is repugnant to the provisions of the above article of the constitution; and 2. The act does not require the county commissioners to file the returns of such an election.

The demurrer having been overruled, the commissioners made a "return" to the writ, setting up that the election was not held in accordance with the provisions of the general election law, approved June 7, 1887, which is chapter 3704, and is entitled "An act to provide for the registration of all legally qualified voters in the several counties of the state, and to

provide for a general election and for the returns of elections," in this: —

1. That section 8 provides that immediately upon the passage of this law, and every two years thereafter, the governor shall appoint, subject to the removal by him, in each county, one competent and discreet person, who shall be a qualified elector, to be known as the supervisor of registration of electors, and that he shall appoint a registration officer for each election district, whose duty it shall be to attend to the registration of electors in each district as in such act provided; whereas the clerk of the circuit court of Franklin County appointed the deputy registration officer in each voting precinct in the county to register voters at the stated election.

2. That section 29 of the general election law requires inspectors of elections to make returns to the supervisor of registration and county judge, whereas the inspectors of the election in question made returns to the county commissioners.

The only effect of this paper is to raise again, and in an improper manner, the question of the constitutionality of the former statute, and the legality of the election thereunder, covered by the demurrer.

The circuit court, on motion of the relators, quashed this return, and gave judgment that the peremptory writ issue.

Not only is it true that a court will not, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary, but it is also a rule that a court will not listen to an objection made to the constitutionality of a statute by a party whose rights it does not affect, and who has therefore no interest in defeating it: Cooley's Constitutional Limitations, 5th ed., 197. A party who seeks to have an act of the legislature declared unconstitutional must, says the supreme court of Alabama, in *Jones v. Black*, 48 Ala. 540, not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown. The complainants sued as residents and electors of the county without showing any injury to themselves in person, property, or rights, and it was held that the act would not be declared unconstitutional on their application to enjoin the holding of an election on the ground that the statute was unconstitutional: See also *Smith v. McCarthy*, 56 Pa. St. 359.

The validity of an act, says the supreme court of Massa-

chusetts, can be called in question only by those having a direct interest in the rights supposed to be injuriously affected by its provisions; and no one can interpose to ask for the interference of this court to declare the act void, or to prevent its full operation, except so far as may be necessary to support and protect their own property or rights from unauthorized injury or invasion: *Hingham & Q. Bridge & T. Co. v. County of Norfolk*, 6 Allen, 360. In this case, a statute was passed making the turnpike a common highway, and providing for the appointment of commissioners to award the amount to be paid to the turnpike corporation as damages, and in what proportions the same should be paid by the counties in which the turnpike lay, and to award certain other matters and things, and it was held that Norfolk, one of the counties, could not object to the constitutionality of the act on the ground of the effect of the legislature in establishing the turnpike as a common highway on the rights of abutters owning land over or through which the turnpike was originally laid out, and on the pecuniary interest of the several towns on which the burden of supporting the road as a highway was imposed. See also *Wellington v. Petitioners*, 16 Pick. 87; 26 Am. Dec. 631.

In *People v. Rensselaer and Saratoga R. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33, where the attorney-general filed an information in the nature of a *quo warranto* to contest respondent's right to build a bridge across the Hudson at Troy, — a power covered by the terms of the company's charter, — it was held that the constitutionality of a legislative act cannot be called in question by the people, but that individuals alleging themselves to be injured thereby can alone raise the question.

In *Lopez v. State*, 42 Tex. 298, where a motion had been made in the lower court for a new trial on the ground that there was no constitutionally appointed clerk, and refused, and the refusal was assigned as error, it was held that the constitutionality of the statute under which the appointment was made would not be determined on an appeal in a criminal cause, with which the clerk had no further connection than as acting clerk certifying the transcript.

In *Marshall v. Donovan*, 10 Bush, 681, where Marshall, a white person, objected to a tax because the statute under which it was imposed did not extend its benefits to colored children, and was therefore unconstitutional, it was held that

as Marshall was not a person of color it was not necessary to decide the point, and that courts will not listen to an objection made to the enforcement of a statute as unconstitutional by a party whose rights it does not affect, and who has therefore no interest in defeating it. See also *Williamson v. Carlton*, 51 Me. 449; *Dejarnett v. Haynes*, 23 Miss. 600.

It is also a rule that where county commissioners, or other similar boards of ministerial officers, are authorized to canvass the result of elections, and declare the result as shown by returns made to them by inferior boards, they cannot pass upon any question of the illegality of the election or of votes cast at the same, nor set up the same as ground for resisting a *mandamus* brought to compel them to canvass the same: *State ex rel. Bloxham v. Board State Canvassers*, 13 Fla. 55; *State ex rel. Drew v. State Canvassing Board*, 16 Id. 17. In the latter case the statute provided that if any returns made to the state canvassing board by the county canvassers "shall be shown or shall appear to be so irregular, false, or fraudulent that the [former] board shall be unable to determine the true vote for any officer or member, they shall so certify, and shall not include such return in their determination and declaration," and it was held that whether a vote cast at an election was legally cast, or whether an election held on the day appointed, of which due returns were made, was a legal election, were judicial questions which the state board could not determine.

As a reason why they should not be compelled to canvass the return from one county (Manatee), the state canvassers set up that the votes of persons not registered had been received, and that no registration lists had been furnished the inspectors, and there had been no designation of voting-places, and no notice of the election, by the county officers. To this, the court answered as follows: "Like the question of the legality of a vote, this is a question of law to be determined by a court; a judicial question beyond the power and jurisdiction of a ministerial officer under the law, constitutional and statutory. A return of votes cast at such general election, duly signed by acknowledged county officers, and regular in form, of which election no notice by county officers as to polling-places is given (the time of election being according to the general notice), is a return which the state canvassers must count, as it is neither irregular, false, nor fraudulent within the meaning of the statute. Whether such vote is effective to vest the office, is a question judicial in its charac-

ter, which this court, upon *mandamus*, should no more determine than should the state canvassers. Such canvassers must count such returns, and so this court should order. Whether all their votes so returned are legal votes is another question, which neither the state canvassers can determine in their action, nor should this court determine it when it is sought to direct them to perform ministerial duties." See also *State v. Hill*, 10 Neb. 58; *Howard v. McDiarmid*, 26 Ark. 100.

The provisions of the statute under consideration require the inspectors of election to canvass the vote cast, and to "make due returns of the same to the county commissioners within five days after said election." This provision imposes, by implication, upon the county commissioners the duty of receiving such returns, when so made, into their official custody and keeping. It makes them the official depository of the same as records of the result of the election just as much as if the statute said in express language they should so receive and file them. To hold to the contrary would make the statute meaningless, and require of the inspectors the idle ceremony of tendering the returns to the commissioners without imposing upon the latter a corresponding duty of receiving them; and under such a construction, the provision in question would either have no effect, or would relieve the inspectors of any responsibility for the care of the returns after the futile performance of offering them to officials who are not bound to receive them had been even most solemnly enacted.

If any further duty is imposed upon the commissioners than our understanding, as above expressed, indicates, we do not now perceive; nor, even if it be so, does the writ call for the performance of any further duty. There is nothing in the objection that the statute does not require the commissioners to "file" the returns. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file: *Bouv. Law Dic.*, tit. File. The usual file-marks are but one evidence of its having been filed: *Willingham v. State*, 21 Fla. 788, 789. The duty of filing usually includes that of putting on such marks. It is the duty of the county commissioners to receive these returns, and to put and keep them in the same custody they put and keep their papers and books and other official records, and have the same file-marks put on them as are usually put on their papers.

The duty of the commissioners being merely to receive and keep in their official custody the returns, as indicated, such duty involves no consideration by them of the legality of the election held under their call, nor does it permit them to raise before us the question of such legality as a reason for not performing their stated function; nor does its performance decide or conclude anything as to the legality of the election, but merely preserves the evidence of the actual result of the same as shown by the returns. The statute has not given, even if it could do so under our constitution, to them the power to decide any such question, nor is this a proceeding for us to decide it in, nor are the proper parties before us. As county commissioners they are not charged with the duty of raising the question in behalf of those who may have personal interests which the enforcement of the nineteenth article of the constitution may affect. If they have such personal interests themselves, these interests do not attach to their official duties as commissioners, and cannot be permitted to stand in the way of their performance. If there be any person in Franklin County whose personal interests the enforcement of such article affects, the county commissioners are not the tribunal authorized to pass upon either the validity of the act or the legality of its enforcement. The validity of such act, and of the proceedings thereunder, will be considered when parties having interests affected by either are before us.

The county commissioners have, as such, no right that will be affected by the performance of the duty imposed upon them by the statute, nor will their performance of such duty injure any person's rights that may be affected by an enforcement of the article of the constitution questioned.

The judgment is affirmed.

CONSTITUTIONAL LAW—STATUTES, WHO CAN AND WHO CANNOT ATTACK: Strangers to the rights affected cannot take advantage of the unconstitutionality of a statute: *Wellington v. Petitioners*, 16 Pick. 87; 26 Am. Dec. 631; *People v. Rensselaer*, 15 Wend. 113; 30 Am. Dec. 33; *Sullivan v. Berry*, 83 Ky. 198; 4 Am. St. Rep. 147, and note 152.

ELECTIONS—CANVASSING BOARDS.—The board of election canvassers can only declare the result, and cannot pass upon the qualifications of the voters or the reception of their ballots, nor can it determine whether, in making up the result of the poll, ballots should or should not be counted: *People v. Kilduff*, 15 Ill. 492; 60 Am. Dec. 769. Duties of boards of canvassers are ministerial: Note to *People v. Van Cleve*, 53 Am. Dec. 73.

FILING, WHAT IS.—A paper is filed when it is delivered to the clerk of court to be kept with the other papers in the same cause: *Engleman v. State*,

2 Ind. 91; 52 Am. Dec. 494, and note 499; and the certificate entered upon the paper at the time of filing is the best evidence of such filing, but such certificate is not necessary to the act of filing: *Peterson v. Taylor*, 15 Ga. 489, 60 Am. Dec. 705, and note 707.

SAULS v. FREEMAN.

[24 FLORIDA, 209.]

JUDGES — DISQUALIFICATION OF. — Under a statute requiring a property interest in the action or its result to disqualify a judge from sitting therein, an interest held by him, in the change of location of a county site, and in common with all the registered voters and citizens of the county, is not a disqualification.

JUDGE — DISQUALIFICATION. — Under a statute requiring a property interest in an action to disqualify a judge from sitting therein, the fact that a judge signed a petition on the question of changing the location of a county site will not disqualify him from sitting in and deciding a *mandamus* proceeding instituted by the petitioners to compel the proper officers to call an election on the question of changing such site.

RES JUDICATA. — Where proper representatives of a county fail to avail themselves of any legal defense to a writ of *mandamus*, the people of the county generally are precluded by the judgment thereon, in the absence of fraud or collusion between any of the parties.

RES JUDICATA. — JUDGMENT AGAINST A COUNTY or its legal representatives in a matter of general interest to the people thereof concludes not only the parties named as defendants, but also all the citizens of the county not so named.

RES JUDICATA. — JUDGMENT ON MANDAMUS directing the proper officers to call an election on the question of changing a county site concludes the voters or citizens of the county, other than the relators, from instituting proceedings to prevent such officers from removing county records to the county site chosen at such election, when the matter set up might have been interposed as a defense in the *mandamus* proceeding.

PLEADING AND PRACTICE — DISMISSAL OF BILL FOR INJUNCTION. — Where it is apparent from the bill for an injunction that there is no ground for relief, the bill may be dismissed at the hearing for the preliminary injunction without requiring the defendant to answer.

BILL in equity for an injunction against the removal of the public offices and records of a county to the site selected at an election held for that purpose. The facts are stated in the opinion.

Foster and Gunby, and John W. Price, for the appellants.

Hamlin and Stewart, and C. P. and J. C. Cooper, for the appellees.

RANEY, J. 1. Judge Broome, of the seventh circuit, on the presentation of the bill to him on the sixth day of April of the

present year, made an order enjoining, until the further order of the court, the defendants, appellees, from moving the county records from Enterprise, the old county site. Three days afterwards he dissolved the injunction and dismissed the bill. From the latter order complainants appealed to the June term. In view of the public interests involved, and by consent of parties, we consented to hear the case at the present term.

2. The first question to be disposed of is that of Judge Broome's legal qualification to entertain the *mandamus* proceedings set up in the bill. He, according to the allegations of the bill, signed the petition to the county commissioners for an election on the question of changing the location of the county site. It is claimed that, from the fact of being one of such petitioners for an election, he was so interested as to disqualify him to sit in the *mandamus* proceedings.

The statute of 1862 (section 28, page 337, McClellan's Digest) provides that no judge of any court or justice of the peace shall sit or preside in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a competent tribunal: McClellan's Digest, sec. 28. The act of 1870, section 30 of the digest, declares that no justice, judge, or juror shall be disqualified from sitting in the trial of any suit in which any county or municipal corporation is a party by reason that such justice, judge, or juror is a resident or tax-payer within such county or municipal corporation.

The statute of 1862 is cited by counsel for appellants, and it is argued by them that no signer of the petition would have been a competent juror had an issue of fact in the *mandamus* been sent to a jury. Issues of fact in the *mandamuses* are tried in this state by the judge or court, and not by a jury: *State ex rel. v. Commissioners of Suwannee County*, 21 Fla. 1; but it is yet true that the same interest that would disqualify persons as jurors, were they triers of facts in *mandamus* proceedings, will disqualify a judge.

The first section of our statute regulating the change of county sites is as follows: The registered voters of any county in this state wishing to change the location of their county site shall present to the board of county commissioners of such county a petition signed by one third of the registered

voters praying for a change of the location of such county site. The other sections make it the duty of the commissioners to order an election upon receiving such petition, and they provide for the canvass of the returns, and make other provisions not necessary to be noticed here.

The location of county site is a public question in which all the registered voters and citizens of a county have a common interest. The fact that a person signs a petition "praying for a change of location" of the county site is evidence that he desires a change, and that in his opinion the public convenience and welfare demand that an election shall be held, at which the judgment of the registered voters of the county as to whether there shall be a change, and to what place the change shall be made, shall be taken; but it is not evidence of what particular place he may desire the change to be made to, nor that his wish for a change is characterized by any motive other than the promotion of the public good and common convenience. It is not evidence that he has any pecuniary interest in any place that may be voted for as the county site, nor is the issue in itself one of pecuniary interest, but it is a public question in which each elector may express his judgment and desire upon the question of calling an election by signing or refusing to sign the petition, and, at the election, by voting for whatever place he may please, without thereby subjecting himself to the imputation of acting under the influence of improper motives or personal interest.

It is true that the same interest that would disqualify a juror will, under our statute, disqualify a judge, but the fact of having signed such a petition is not evidence of any interest within the meaning of the term as used in the statute. Whatever effect it may in its consequences lead to, as to such signers, would result also as to any other citizen similarly situated, though not a signer.

The interest meant by the statute is property interest. In *Inhabitants of Northampton v. Smith*, 11 Met. 395, it is said that the interest must be a pecuniary or proprietary interest,—a relation by which, as debtor or creditor, or heir or legatee, or otherwise, the judge will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror: See also *Sjoberg v. Nordin*, 26 Minn. 501. If the nature of the suit is such that no individual property interest of the judge or juror is involved in it, there can be no disqualification as to

either on the ground of interest. Such is clearly the nature of the *mandamus* proceeding. It was not brought to enforce any individual property rights of any one, but to compel the commissioners to perform a public duty. Any citizen of Volusia County could have instituted the *mandamus* proceedings although not a signer of the petition presented to the county commissioners: High on Extraordinary Legal Remedies, sec. 431.

In *Rogers v. Cypert*, decided by the supreme court of Arkansas in 1881, and cited and explained in *Foreman v. Town of Marianna*, 43 Ark. 331, there was an application for a *mandamus* to compel a circuit judge to entertain and act upon a petition for a writ of *certiorari* to bring up the record of proceedings had in the county court under a local-option liquor law. The circuit judge answered the *mandamus* by stating that he had not refused the *certiorari* in the exercise of his sound discretion, but had refused to take any cognizance of the application for it, for the reason that "his wife and children had signed the original petition to the county court for the prohibition, and that he supposed he was thereby disqualified from acting in the case, under that clause of the constitution which forbids a judge from presiding where either of the parties shall be connected with him by consanguinity or affinity within such degree as may be prescribed by law." The *mandamus* was granted, the view of the court being that although the wife and children of the judge were technically parties, as being amongst the petitioners, yet inasmuch as the proceeding was not a personal one, and their interest was only a common interest with other citizens in the establishment of a wholesome police regulation affecting the whole community, they were not parties within the sense or within the spirit of the constitution.

In *Foreman v. Town of Marianna*, *supra*, it was held that a judge of a county court was not disqualified to act upon an application to annex territory to a municipal corporation by reason of being a resident of the corporation, and having voted for or against the annexation. Eakin, J., speaking for the court, says: "The judicial ermine does not absolve the individual from the duty, nor deprive him of the right, to participate with other citizens in public movements for the public good which do not in any particular manner affect his private interests more than those of other citizens. How far he may do so in anticipation of the probability or chance that he may

be called to decide upon the legality of such proceedings, is with him a consideration of prudence or good taste, to be determined in his own breast. If he were thereby disqualified, he would be required to renounce all civic privileges. He could not even try a contested election case where he had voted for one of the contestants."

In *Webster v. County of Washington*, 26 Minn. 220, the conclusion reached is, that an ownership of lands contiguous to the line of a proposed county highway, which may affect or enhance the value of such lands, is not such an interest as legally precludes the owner from acting as a member of the board of county commissioners upon a petition signed by himself and others for establishing the road. The road as proposed did not pass over this commissioner's land; his only interest was that of an adjacent proprietor of land indirectly benefited by the proximity of a new road, and the additional facilities it might give to trade and travel. The benefit he might thus enjoy, say the court, would be participated in, though perhaps in irregular degrees, by the proprietors of all lands accessible to the road, and to a greater or less extent by the whole public that might have occasion to use the road. His interest was held not to be such a direct and private one as, in the absence of a disqualifying statute, would make his acts void and illegal.

The supreme court of Missouri decided, in *Bowman's Case*, 67 Mo. 146, that a judge was not disqualified to sit in the trial of a case instituted by persons composing a committee of a corporation by reason of the fact that he was an honorary member of the corporation.

In *Commonwealth v. O'Neal*, 6 Gray, 848, it was held that members of an association to prosecute violations of the statutes prohibiting the manufacture and sale of intoxicating liquors who have each, by subscribing a certain sum to the funds of the association, rendered themselves liable to pay, to the extent of their subscription, their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution commenced by the agent of the association and carried on at its expense, if it does not appear but that they have paid their subscription before this prosecution was commenced. For aught that is shown, says this opinion, each of them may have paid before this prosecution was commenced the full sum he had subscribed; it therefore does not appear that either of the jurors

had any, even the smallest, pecuniary interest in the event of the prosecution, and the court cannot presume without evidence that they had. They might have been interrogated on oath whether they had expressed or formed any opinion in the case, or were sensible of any bias or prejudice, and their answers might possibly have been such as to exclude them from the panel, but this was not done. The ruling in *State v. Wilson*, 8 Iowa, 407, and *Fleming v. State*, 11 Ind. 234, are in the same line as showing that questions as to membership of such committees are admissible for the purpose of testing the juror's impartiality and freedom from bias, instead of his interest in the cause.

There is nothing in the record indicating that Judge Broome has advised or in any manner encouraged the institution of the *mandamus* proceeding.

It is of course not pretended that the judge has any prejudice, nor has any action under the statute authorizing a challenge of a judge on such ground been taken.

We do not think, if an issue of fact in the *mandamus* proceeding could have been sent to a jury for trial, that one of the signers of the petition would have been rendered incompetent as a juror on the ground of interest by the mere fact of being such signer. Whether in his connection with the petition a signer of it may have expressed or formed such an opinion as would disqualify him as a juror, or had through such connection become possessed of prejudice or bias, are questions to be decided when they are presented.

We conclude, upon the principles of law governing in such cases, that Judge Broome was not disqualified by reason of any interest to sit in the *mandamus* case; yet we feel that he would not have signed the petition had it occurred to him at the time of signing it that his competency to sit in any litigation involving the election thereunder might on that account be challenged.

3. The next question to be disposed of is, whether or not the complainants are concluded from asking relief upon their bill by the *mandamus* judgment.

The alternative writ of *mandamus* set up in the chancery bill recites that it has been suggested that Isaac A. Stewart, J. B. Jordan, J. J. Banta, G. A. Dreka, F. S. Goodrich, J. G. Owen, and Samuel Lowrie are registered voters of Volusia County, and that they, with other registered voters of the county, to the number of 825 (more than one third of the

registered voters of the county, there being only 2,272 registered voters in the county), being desirous of changing the location of the county site of the county, signed and presented a petition to the board of county commissioners of the county, and that the petition was received by such board, composed of D. Freeman, G. D. Bryan, J. G. Poppell, and J. D. Ross, said petition praying for a change of the location of the county site, and for an election thereon, and that such petition was in due form of law, and was presented to the board when in session on the seventh day of February, A. D. 1888, by Isaac A. Stewart, one of said petitioners, on behalf of himself and the other petitioners, with the request that an election be then ordered; and that the board refused to grant the prayer of the petition, or to order an election on the question of the change of the location of the county site of the county as asked. The command of the writ is, that the said county commissioners forthwith assemble as such and order an election on the question of a change of location of the county site, or show cause why they should not, at the place and time stated in the writ.

Three of the commissioners, D. Freeman, J. G. Poppell, and J. D. Ross, answered, stating that said Isaac A. Stewart, J. B. Jordan, J. J. Banta, G. A. Dreka, F. S. Goodrich, J. G. Owen, and Samuel Lowrie, being registered voters of said county, with others, registered voters of Volusia County, to the number of 825, did sign and present a petition to the board of county commissioners of Volusia County on February 7, 1888, while said board was in session, and that the petition contained the names of more than one third of the registered voters of the county, there being 2,272 registered voters on the lists of registration, and that the petition was addressed to the board of county commissioners, and prayed for a change of the location of the county site of the county.

That the only reason an election was not ordered on presentation of the petition was, that G. D. Bryan, one of the members of the board, said that he had information from an attorney that an election could not be ordered, and that another attorney advised them to the same effect. Both attorneys are designated.

That the said D. Freeman was chairman of the board, and said J. D. Ross made a motion to order an election, but the same was lost, and the said matter was postponed on the advice of an attorney.

That the commissioners all acted in good faith; that they

have attempted to get a meeting of the board since the discovery of the error caused by the advising attorney and Bryan; but have failed to have a full meeting on account of Bryan disregarding the call of the chairman, and his promises to meet with them.

Judge Broome held the answer to be insufficient, and granted a peremptory writ commanding the commissioners to meet on a day to be specified by the chairman for the purpose of ordering the election.

If there was any fatal deficiency in the petition filed before the county commissioners, or any other good reason in law why the election should not have been called, it could have been interposed as a defense to the alternative writ of *mandamus*; and it was the duty of the commissioners to do so. They are the representatives of the county in the matter of their duties under the statute, and if they failed to avail themselves of any legal defense to the writ, the complainants and other people of the county are precluded by the judgment thereon, there being not only no charge of fraudulent collusion between the commissioners and the petitioners, or between the former and the relators, but none of fraud of any kind against either the commissioners, the petitioners, or the relators.

A judgment against a county or its legal representatives in a matter of general interest to all the people thereof as one respecting the levy and collection of a tax is binding, not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name: *Clark v. Wolf*, 29 Iowa, 197; Freeman on Judgments, sec. 178. In *Gaskill v. Dudley*, 6 Met. 546, 39 Am. Dec. 750, D. recovered judgment by default against a school district in an action on a contract with the district to build a school-house, and levied his execution on the goods of G., a member of the district, and it was held that G. could not give evidence that D. had not performed his contract, and therefore ought not to have recovered judgment against the district; and in *Lane v. Inhabitants of School District in Weymouth*, 10 Met. 462, the decision was, that individual members of a school district had no right to appear and be heard in defense of an action against the district.

If the judgment in *mandamus* was not as effectual, upon the principle of *res adjudicata*, against the inhabitants of the county as it is against the county commissioners, there would

be no end to litigation in such cases, or in any cases against county officials as such: *Terry v. Town of Waterbury*, 35 Conn. 526, 534.

Every question suggested by the bill as to the validity of the petition, including those as to the names of some of the signers being on the registration lists, and those as to the legality of the registration of others, could, in so far as they were the subjects of judicial inquiry, have been raised by the commissioners in the *mandamus* proceeding: *County Commissioners of Columbia County v. Bryson*, 13 Fla. 281.

The award of the peremptory writ adjudicated the legality of the petition in all respects, and settled the question of the duty of the commissioners to call the election.

When they met pursuant to such call the legality of the petition was in no wise open for their consideration, and nothing more than this need be said of the allegations of the bill as to what they did or did not do in the line of such consideration at their meetings subsequent to the award of peremptory writ.

This bill seeks to open again what had already been adjudicated. In *Cromwell v. County of Sac*, 94 U. S. 351, speaking of the effect of a former judgment on the same claim, it is said that it, "if rendered on the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose": *Aurora City v. Wirt*, 7 Wall. 82; *People v. Board of Supervisors*, 27 Cal. 655; *Durant v. Essex*, 7 Wall. 109. Neither the fact of the admissions in the return to the alternative writ, nor the absence of any issue of fact from the *mandamus* pleadings, constitute any exception to the rule, for it makes "no difference in principle whether the facts upon which the court proceeded were proved by deeds and witnesses or whether they were admitted by parties. And an admission by way of demurrer to a pleading in which the facts are alleged must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury": *Bouchard v. Dias*, 3 Denio, 238, 244. The *mandamus* seems to have in effect been submitted as upon demurrer to the answer (*People v. Board of Supervisors*, 27 Cal. 655), and this involved an inquiry into the sufficiency of the alternative writ or declara-

tion, which writ averred the entire legality of the petition and its presentation to the commissioners, and the commissioners and their privies are forever precluded, by the judgment rendered, from contesting such legality on any ground, whether of law or fact, in any other proceeding: *Block v. Commissioners*, 99 U. S. 686.

4. The only other ground of appeal requiring consideration at our hands is that as to the dismissal of the bill.

The only relief prayed is an injunction, and it is apparent on the face of the bill that there is no ground for such relief. It sets up the proceedings at law which preclude the complainants from the relief they seek. They can derive no benefit from having the defendant answer, and it would be both useless and a hardship to require the defendants to answer: 2 High on Injunctions, secs. 1580, 1706. Had the bill been filed to restrain the proceeding in *mandamus* pending such proceedings, it would have been dismissed for reasons indicated above, as was done in *County Commissioners v. Bryson*, 13 Fla. 281. Had this bill not been dismissed by the chancellor, it would be our duty to direct a dismissal, as, considering the whole of it, there is no equity in it: *Freeman v. Timanus*, 12 Fla. 393; Daniell's Chancery Practice, 557, note 4.

The order appealed from is affirmed, and it will be decreed accordingly.

JUDGE DISQUALIFIED WHEN AND WHEN NOT. — See note to *Moers v. Julian*, 84 Am. Dec. 126-132; *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513; *Fowler v. Brooks*, 64 N. H. 423; 10 Am. St. Rep. 425, and note.

RES JUDICATA. — As to the binding effect of a judgment against a county or county officials acting in behalf of such county upon all the citizens of the county, see *Freeman on Judgments*, sec. 173. A judgment against a county is binding upon all the citizens thereof, although they are not parties thereto: *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502; and judgments are binding as *res judicata* upon the parties and all their privies, whether of blood, estate, or law: *Woods v. Montevallo etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Savage v. McCorkle*, 17 Or. 42; *Hall v. Zeller*, 17 Id. 381. A sale under a judgment of a court having competent jurisdiction over the subject-matter is binding upon and estops all persons interested who were duly represented before the court at the rendition of the judgment: *McMillan v. Reeves*, 102 N. C. 554. Judgments are binding only upon the parties thereto and their privies; the parties being those persons only who are named in the judgment, and who were properly served with process, or entered their appearance; privies of blood being such persons who derive title from the parties to the property in question by descent; and privies of estate, such persons who derive title by purchase; and privies to a judgment, whether by estate or blood, are such persons whose succession to the rights in the property occurred after the institution of the suit in which such judgment

was rendered: *Orthwein v. Thomas*, 127 Ill. 555; 11 Am. St. Rep. 159. To apply the rule of *res judicata*, it is sufficient that the parties to the pending action were before the court in a prior action in which a judgment was rendered binding upon them: *Wilson v. Buell*, 117 Ind. 315. One who by counsel procures a matter to be litigated in another's name, who is only nominally interested in the matter, is bound by a judgment rendered therein: *Burris v. Gavin*, 118 Id. 320.

EX PARTE BRYANT.

[24 FLORIDA, 278.]

CRIMINAL LAW — POWER TO IMPRISON UNTIL A FINE IS PAID. — Where a sentence upon conviction of larceny is to pay a fine, and is accompanied with an order of commitment until payment is made, the fine is the penalty, and the commitment is the method of enforcing its payment or of enforcing the sentence.

CRIMINAL LAW — CONSTITUTIONALITY OF SENTENCE OF FINE OR IMPRISONMENT UNTIL PAYMENT THEREOF. — A sentence to pay a fine, accompanied with an order of commitment until payment thereof, is not unconstitutional as inflicting "indefinite imprisonment," as such sentence with award of process does not necessarily create an indefinite or any imprisonment.

John S. Beard, for the petitioner.

C. M. Cooper, attorney-general, for the respondent.

The CHIEF JUSTICE. At the fall term of the circuit court for Leon County, Lott Bryant was convicted of larceny. The sentence was, "that you, Lott Bryant, for your said offense, do forfeit and pay to the state of Florida the sum of two hundred dollars, and that you pay the costs of this prosecution, including a fee of ten dollars to the state's attorney, to be taxed by the clerk, and that the sheriff do keep you in custody until the judgment of this court is complied with." Thereupon he was taken to jail. He now files a petition in this court representing that he is "illegally held and detained in the common jail of said county by . . . the sheriff, . . . upon and by virtue of a commitment issued upon said judgment and sentence, which sentence [he] submits . . . is void, as being contrary to and in violation of section 8 of the bill of rights of the state of Florida," and praying for writ of *habeas corpus*, which was granted. The sheriff makes return that he holds petitioner by virtue of the commitment aforesaid.

Is the sentence void for the reason alleged? The section 8 referred to is this: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment

or *indefinite imprisonment be allowed*, nor shall witnesses be unreasonably detained." It is contended that the sentence, in case the fine is not paid, amounts to perpetual imprisonment, and that this is in conflict with the protection allowed by the clause italicized.

This view rests upon the assumption that in committing the prisoner to custody until he paid the fine, that was a part of the penalty imposed. But such assumption is not well founded. The penalty, or the punishment adjudged, was the fine, — the custody adjudged was the mode of executing the sentence; that is, of enforcing the payment of the fine. This is in accordance with the rule of the common law under which a sentence in larceny to pay a fine was accompanied, as in the present case, with an order of commitment until the payment was made: Bishop's Crim. Proc., secs. 1132, 1135; *Davis v. State*, 22 Ga. 98; *Hill v. State*, 2 Yerg. 248. The commitment might be to the sheriff or generally until payment of the fine: *King v. Bethel*, 5 Mod. 21. We are cited to *Howard v. People*, 3 Mich. 207, and to *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777, for authorities sustaining a different rule. In the latter case, imprisonment was ordered "until [the party] perform the sentence, or be otherwise discharged by due course of law." The court held this to be illegal because the statute applicable to the case only authorized a sentence that the party "stand committed for thirty days in default of payment." This was a case, therefore, in which there could be no general commitment, the court being restrained by special statute. The Michigan case is different. It does not hold a doctrine in conflict with that of all the other authorities we have seen, but professes to base it on certain statutes, which, so far as we can see, do not call for the decision given. We cannot follow this in opposition to the well-established rule of the common law.

What, then, is meant when it is said "indefinite imprisonment" shall not be allowed?

If it be doubtful whether it relates alone to the penalty awarded, and not also, as in a case of larceny where a fine is imposed, to the imprisonment under the process to enforce the penalty, still, in the case before us, we do not see that the sentence of the court violates the prohibition. A *capias* is the writ which our statute provides for the execution of the sentence. Section 8, McClellan's Digest, page 294, reads: "Whenever any person shall be adjudged to pay . . . fines,

forfeitures, fees, or costs, a *capias* may be issued against the body of the person adjudged to pay, and the said *capias* shall have, in addition, the force and effect of a *fiery facias*," etc.

The sentence to pay a fine, with award of process, does not necessarily create any imprisonment; the effect of the clause complained of in the sentence is nothing more than an award of the process, and the mere fact that the petitioner is held under such process is not a case of indefinite imprisonment. The sentence does not of itself impose an indefinite imprisonment; nor are any circumstances creating such an imprisonment shown to exist in the case made by the petitioner. He merely shows that he is held under the proper writ for enforcing the payment of a fine.

The petitioner will be remanded.

RIGHT TO IMPRISON UNTIL FINE IS PAID. — Under the common-law rules, it is the practice, when punishment inflicted is by sentence to pay a fine, to include in the judgment an order that the prisoner be committed to jail until the fine is paid. This has been the practice in England from the earliest times until a comparatively recent date at least, and it seems that it has never been successfully assailed on the ground that such judgment inflicted perpetual or indefinite imprisonment: *Rex v. Hord*, Sayers, 176; *Rex v. Layton*, 1 Salk. 353; *Godfrey's Case*, 11 Coke, 42 a; *Rex v. Sterling*, 1 Lev. 125; *Rex v. Bethel*, 5 Mod. 19; *Regina v. Dunn*, 12 Q. B. 1026. The rule above stated has been followed very generally in this country, either from the adoption of the common-law doctrine, or under statutes, in effect, confirming it. Thus in *Brock v. State*, 22 Ga. 98-101, it is said: "The penalty for the offense of which the defendant was convicted is pecuniary altogether. The court, on imposing the penalty, may enforce its payment by adjudging that the party convicted be committed until the fine and costs are paid. The imprisonment is no part of the penalty imposed, but it is the means, and the legal means, of enforcing the judgment of the court. Such is the judgment in this case. The imprisonment is not ordered as a penalty, and the judgment is not in the alternative, and the imprisonment, when suffered, is not a discharge of the penalty. That still remains." Under a judgment or sentence that the prisoner stand committed until the fine is paid, he is entitled to his discharge as soon as the fine is paid. This ruling has been followed in a number of cases in the state courts, and is recognized as law and adopted by the supreme court of the United States: *Ex parte Jackson*, 98 U. S. 727; *Hill v. State*, 2 Yerg. 247; *Kane v. People*, 8 Wend. 203; *Pifer v. Commonwealth*, 14 Gratt. 710; *Hudeburgh v. State*, 38 Tex. 535. Under statutes authorizing the imposition of a fine for certain offenses, and providing for imprisonment until payment in default thereof, or until the fine is satisfied by execution against the prisoner or otherwise, it is the common practice to sentence the accused to pay a fine and costs, and to order him committed to jail until the fine is paid or he is otherwise discharged. Such statutes are held to be constitutional, and not illegal as imposing indefinite punishment or imprisonment: *In re Beall*, 26 Ohio St. 195; *Morgan v. State*, 47 Ala. 34. But it has been held that where a fine is imposed, the court has no authority to commit the

person convicted to jail until the fine and costs are paid, and at the same time issue an execution therefor: *O'Conner v. State*, 40 Tex. 27.

A judgment committing a defendant to prison until the payment of a fine imposed is not void because it does not specify the extent of the imprisonment, when the limit thereof is fixed by statute: *Jackson v. Boyd*, 53 Iowa, 536. Under the statute, a person convicted of gaming may be ordered to jail forthwith upon his refusal to pay the fine assessed: *Faris v. Commonwealth*, 3 B. Mon. 79. So under a statute regulating the sale of liquors by license, a party convicted of a violation thereof may be sentenced to pay a fine and costs, and to stand committed to jail until such sentence is performed: *Harris v. Commonwealth*, 23 Pick. 280. And under a statute regulating weights and measures, and providing for the appointment of an inspector and sealer thereof, and also providing for the enforcement by fine of the weights and measures so sealed, any one who violates the statute may be fined and the fine may be collected either by commitment to prison of the person upon whom the fine is imposed, or by *fiery facias*: *Huddleson v. Ruffin*, 6 Ohio St. 604. Again, under a statute providing that for a violation of a liquor law, the defendant may be fined twenty-five dollars for each and every offense, and be imprisoned in the county jail until such fine and costs are paid, such provision is not inflicting imprisonment as punishment, as power is given to assess a fine only on conviction. The imprisonment is but a mode provided for collecting the fine. And it is not essential to the power to imprison in such a case that there should first have issued a *fiery facias*, and an effort have been made in that way to satisfy the fine out of the goods of the defendant; but he may be imprisoned at once upon refusal to pay the fine and costs: *Ex parte Bollig*, 31 Ill. 89. So where upon conviction the prisoner is sentenced to imprisonment in the county jail for thirty days, and to pay a fine of seventy-five dollars and costs, and stand committed until such fine and costs are paid, not exceeding thirty days in addition to the thirty days' imprisonment, such judgment is valid, as the commitment in default of the payment of the sum named is not part of the penalty imposed for the offense, but is to compel obedience to the order of the court directing the payment of the fine: *State v. Peterson*, 38 Minn. 143. Such a judgment is not illegal as being a sentence for imprisonment for costs: *State v. Boynton*, 75 Iowa, 753. The judgment should, however, definitely specify the term of imprisonment for such costs as are assessed: *Armstrong v. State*, 83 Ala. 49; *Gady v. State*, 83 Id. 51. Such a sentence is not illegal as being in conflict with constitutional prohibitions against imprisonment for debt: *Kennedy v. People*, 122 Ill. 649; *Brown v. People*, 19 Id. 613; *Caldwell v. State*, 55 Ala. 133; *Morgan v. State*, 47 Id. 34; *Ex parte Howard*, 26 Vt. 205.

The ruling in the principal case has been affirmed and followed in a late case in Florida, not yet reported, where it is held that a judgment committing the convict until a fine and costs assessed against him are paid, is legal, and not unconstitutional as inflicting indefinite imprisonment: *Ex parte Peacock*, Fla., July 31, 1889. In some of the courts a different rule has been maintained, and it is held that, where the statute fixes the limit of imprisonment, a judgment that defendant pay a fine, or stand committed until such fine is paid, is void, as inflicting an indefinite term of imprisonment: *Howard v. People*, 3 Mich. 208; *Larve v. Roeser*, 8 Id. 536; *Washburn v. Belknap*, 3 Conn. 502; *In re Sweatman*, 1 Cow. 144-149; *Gurney v. Tufts*, 37 Me. 130; 58 Am. Dec. 777. In *Brownbridge v. People*, 38 Mich. 751, it is said that a sentence imposing imprisonment by way of compelling payment of a fine is void if it does not provide that the imprisonment shall have an out.

side limit, and shall end as much sooner as the fine is paid. In North Carolina, alternative judgments are not allowed, therefore an order that the prisoner pay a fine, and in default thereof be imprisoned, is void: *State v. Perkins*, 82 N. C. 681. Where a statute provides that a party convicted of an offense created by it shall be fined or imprisoned, the court has no power to fine and imprison: *State v. Walters*, 97 Id. 489; *Ex parte Gilmore*, 71 Cal. 624.

CRIMINAL LAW — CONSTITUTIONALITY OF A STATUTE PERMITTING IMPRISONMENT UNTIL FINE IS PAID. — Although a statute which imposes a penalty is open to constitutional objections on account of the unlimited discretion given the judge as to imprisonment of a convicted and sentenced defendant in a criminal case for a failure to pay a fine imposed, that is no obstacle to an action for the penalty, inasmuch as the provision relating to imprisonment is severable from the rest of the statute, which is complete within itself: *Commonwealth v. Sherman*, 85 Ky. 686.

In California, though a statute authorizes one convicted of assault with a deadly weapon to be punished by "imprisonment in the state prison or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both," a court sentencing a prisoner to the state prison and to the payment of a fine cannot require him to be imprisoned in such prison until the fine is paid. That part of the sentence can be enforced only by confinement in a county jail: *Ex parte Arras*, 78 Cal. 304. Nor can the prisoner be compelled to labor during such confinement: *Id.*; *Ex parte Kelley*, 65 Id. 154.

STATE v. DEAL.

[24 FLORIDA, 293.]

STATUTES — VALIDITY — METHOD OF ENACTMENT. — Where an amended act is passed by both houses of a legislature, but before its approval by the governor as passed other sections of the original bill are added, after which the whole is signed by the proper officers of both houses, and approved by the governor, the whole act is void, if the genuine and spurious portions are so connected in subject-matter that they depend upon each other, and operate together for the same purpose, and the spurious part changes the legal effect of the genuine part. If, however, the two parts are entirely severable, distinct, and independent, the genuine part will be allowed to stand as law, and the spurious portion rejected.

STATUTES — ENACTMENT — GOVERNOR EXERCISES LEGISLATIVE FUNCTION IN APPROVING STATUTES. — The approval of an act is an essential prerequisite to the enactment of a law, and such approval is performed by the governor in a legislative capacity as part of the law-making power, and not as the law-executing power.

STATUTES — VALIDITY — METHOD OF ENACTMENT. — When an ostensibly perfect bill is submitted to the governor for his action as part of the law-making power, and he approves its several parts collectively, thinking them all valid, and it subsequently appears that some of them are spurious, the whole act will be declared void, unless it clearly appears that the spurious parts are such as not to have influenced the governor in approving the other parts, or that the latter are entirely severable, distinct, and independent of the former.

Calhoun and Davis, for the relators.

Sumner C. Chandler, for the respondent.

RANEY, J. A bill to be entitled "An act to revoke and abolish the present municipal government of the town or city of Palatka, and to reorganize a city government for the said town or city," and containing thirty-one sections, numbered from 1 to 31, consecutively, passed the senate at the last session of the legislature, and in this condition reached the house of representatives, where it was amended by striking out everything after the enacting clause, and inserting, in lieu of the matter so struck out, eight new sections. This amendment was concurred in by the senate. In enrolling the bill, the amendatory sections were substituted for the first eight original sections of the bill, and such amendatory sections and the twenty-three sections numbered from 9 to 31, consecutively, of the original bill were enrolled, and in this condition the enrolled bill was signed by the officers of the senate and house of representatives, when it was carried to the governor, who approved it on the third day of June.

Considering the bill as a whole, though it has the sanction of the governor, and is certified to by the officers of the two houses, yet, as is conclusively shown by the journals, it has never been adopted by the two houses referred to: Cooley's Constitutional Limitations, 163, 164.

The question presented for decision is, whether any part of this ostensible statute, as it appears in both the enrolled and the printed laws, is valid.

In *Jones v. Hutchinson*, 43 Ala. 721, the facts were that a bill providing "that all existing judgments of courts of record in this state, and all which may hereafter be rendered in said courts of record, be, and the same are, liens upon all of the property of the defendants therein which is subject to levy and sale," originated in and was passed by the senate. In the house of representatives, the following amendment was adopted: "Provided, that the lien shall extend only to property in the county where the judgment was rendered, and in the county where it is recorded in the office of the probate court," and, as thus amended, the bill passed the house, but the senate refused to concur in the amendment, and a committee of conference was appointed by the two houses. This committee reported against the proviso, and recommended that the bill should be passed without it, and this report was con-

curred in by the house, and the senate was notified of the house having receded from its amendment.

The bill was never enrolled as it passed; but in making what was intended to be an enrolled copy, to be signed by the presiding officers of the two houses, and to be presented to the governor, the proviso was also enrolled as a part of the bill, and in this shape it was signed by the speaker of the house and president of the senate, and approved by the governor.

It is apparent that the bill, as it was signed by the officers of the two houses and approved by the governor, made all existing and future judgments of courts of records liens on the property of the defendants only in the county in which the judgment was or should be rendered, and in those counties where it should be recorded in the office of the probate court, while such bill, as it actually passed the two houses, made judgments of courts of record liens on all property of the defendants in any county in the state, whether the judgment had been recorded in the county or not.

Nothing could be plainer than that the governor had acted on and approved a bill whose provisions were in legal effect one thing, whereas the bill which had passed the two houses of the legislature was entirely different in its legal effect, or as stated by the supreme court of Alabama, the bill which was signed by the officers of the two houses and approved by governor "was not the bill which had been passed by the two houses."

The whole bill was held to be of no validity, the court saying they were not to be understood as deciding that an error of this character would vitiate the whole act, where separate and distinct matter from that of the bill was inadvertently inserted and did not affect the original bill as passed, or change its substance or legal effect.

In *Moody v. State*, 48 Ala. 115, where certain material amendments had been added to the bill after its introduction, but they were omitted in the enrollment, and did not appear in the enrolled bill as signed by the officers of the two houses and the governor, the bill was held to be of no effect as a law.

In *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69, the facts were as follows: In 1868 a statute was passed incorporating the railroad company, and the nineteenth section of the act provided that if the company did not complete the road within four years from the time of commencing its construction, the charter was to be null and void. The

commencement was made in 1873, within the time prescribed by the act, and consequently, as the charter stood, the company had till some time in 1877 to complete the road.

In 1874 an amendatory act was passed, which, in its third section, recited, by way of preamble, that it was feared that the time allowed by the charter for the completion of the road was insufficient, and this third section, as enrolled and approved by the governor, and as printed in the volume of laws, provided that if the road was not finished in five years from January, 1870 (thus diminishing instead of increasing the time allowed by the original act), the charter and all amendments should be void. Upon an examination of the engrossed bill, as it was finally acted upon by the two houses of the legislature, with the indorsements thereon by the proper officers as to the action of the houses, and the journals of both houses, it appeared beyond question that the extension of time for the completion of the road, as provided in the third section of the bill, was five years from the first day of January, 1875. The decision was, that as the third section of the amendatory act of 1874, as sealed and approved by the governor, was materially different from the section as it passed the two houses of the legislature, it was void; but that as the other portions of said amendatory act, exclusive of said third section, were regularly passed by the legislature and approved by the governor, and were (as expressed in the head-note) entirely distinct and severable from the third section, they were valid and effective.

The material difference between the third section of the amendatory act as it passed the two houses and as it was when approved by the governor was occasioned by omitting the word "five" after the word "seventy," in copying or enrolling the bill for signature and approval, and on account of this omission and material difference, the court declared the particular section null and void, and held that the nineteenth section of the original statute was left unaffected, and prescribed the time for completion of the road, viz., four years from the time of commencement, in 1873.

What the provisions of the other sections of the amendatory act of 1874 were does not appear in the report of the case. The doctrine, however, upon which they were held good was, that they were "entirely distinct and severable from that which is void."

In *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647, it appears

that the nineteenth section of "An act to revise, simplify, and abridge the rules, practice, pleadings, and forms of courts in this state," as enrolled and signed by the presiding officers of the senate and house of representatives and approved by the governor, provided, *inter alia*, that the courts for the county of Barnwell should be held at Barnwell, but the legislative journal showed that the section, as it actually passed the two houses, provided that the courts should be held at Blackville. "The consequence is," says the opinion, "that so much of section 19 as attempts to designate a place of holding said court is without the force of law. In other words, the legal effect is the same as if an independent act, making Blackville the place of holding the courts had passed the general assembly, and a totally different act making Barnwell the place had been submitted to the governor in lieu of that passed by the general assembly." In regard to the effect of the change made in section 19 upon the remainder of the bill, it is remarked by the court that, "from the standpoint of legal construction, we must regard it as a matter of indifference, so far as the general scope of the act is concerned, whether the selection fell upon Barnwell or Blackville, or whether the subject was included or excluded from the bill. It is evident that a bill having in contemplation a complete change in the modes and forms of legal procedure could not be prejudicially affected in its general usefulness, and perverted from the object it was intended to secure, by uncertainty as to whether the circuit courts for Barnwell County were to be held at the one place or at the other."

The ground upon which the invalidity of the proviso in the first of the above cases and of the sections in the others is put is, that the same subject-matter had not been acted upon by both branches of the law-making power.

There is no doubt as to the absolute invalidity of section 9 and all subsequent sections of the ostensible statute before us. They are without the sanction of the two houses of the legislature.

The validity of the first eight sections must be passed upon.

"It will," says Judge Cooley (Constitutional Limitations, 211 et seq., 5th ed., or 177, 3d ed.), "sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished

by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder."

In the case before us the fact is, that the ninth and subsequent sections have received the sanction of the governor alone; and some consideration of the provisions of the two sets of sections is necessary.

The first section of the act, as enrolled and printed, provides that within fourteen days after it becomes a law the city council of Palatka shall divide the city into four wards, and that thereafter voters shall be allowed to vote only in the wards they reside in. Section 2 provides that at the next annual election held in the city there shall be chosen two aldermen from each ward, and the voters of each ward shall vote for only two aldermen from their ward; and at the same time there shall be chosen by all the voters of the city one alderman at large, to be voted for by all voters without regard to wards. Of the two ward aldermen chosen at the first election for each ward, the one receiving the highest vote is to hold his office for two years, and the other to hold for one year, and at each subsequent election one alderman is to be chosen for each ward, and his term is to be two years. The alderman at large is to be elected annually.

Provisions upon the above subjects are also to be found in sections 20 and 14. Section 20 provides that the council of Palatka, preparatory to organization under this act, shall, during the year 1887, divide the city into not less than four nor more than ten wards, and appoint polling-places, and provide for holding elections therein, and within four days after the election the mayor and councilmen and officers to be elected shall qualify, and thereafter elections shall be held at such times and places as the mayor and council may ordain, consistently with this act. Section 14 ordains that the council shall be composed of not more than nine councilmen, and that they shall be elected for a term of two years at a general election by the qualified electors of the city, and that not more than two residing in any one ward shall be eligible; that at the first election four of the councilmen shall be elected for

one year, and the others for two years,—the four receiving the highest number of votes at the first election to hold for the long term, and those receiving the next highest to hold for the short term.

As striking as are the dissimilarities in the above provisions of the sections which were adopted by the legislature, and those which were not, there are still others to be noticed. The purpose and effect of the first eight sections were, that they should become operative as to the existing government or officials of Palatka within the ordinary time prescribed by the constitution for a statute to go into effect. On the other hand, section 30 provides that "the present city or town government of Palatka shall not be revoked, abolished, or impaired until the mayor and city council, or a majority of said councilmen, shall be elected and qualified under this act." The title of the act is, "An act to revoke and abolish the present municipal government of the town or city of Palatka, and to reorganize a city government for the said town or city." It is apparent that the purpose of section 30 was (and its effect would be, if valid) that the existing government under the general municipal law should not be affected until the juncture mentioned in such section should be reached.

The fifth section authorizes the council to levy taxes to the maximum extent of two per cent of the assessed value of the property in the city, and section 6 authorizes the issue of bonds for sanitary and municipal purposes by the council, with the approval of a majority of the registered voters. Section 17, on the other hand, allows taxation for ordinary municipal purposes to the extent of two and a half per cent of the value of the property, and such purposes are declared to include all municipal purposes except interest on debt and tax for sinking fund and a tax to pay any judgment against the city or levied in obedience to a *mandamus*; for these additional levies may be made.

The eighth section reserves to or confers upon the city all the rights, powers, and privileges provided for by the general municipal incorporation statutes, not inconsistent with the provisions of the preceding seven sections. There is much legislation in the sections following the eighth as to matters concerning which no provision is made by the first eight sections; and such legislation is entirely inconsistent with the provisions of the general incorporation law on similar subjects. Section 16 gives the mayor and council power to create

such officers (other than those specially provided for by the act), and to provide for their appointment or election, but their "compensation and terms of service shall be fixed before their election, and the compensation shall not be increased or diminished during their term of office." Admitting that the power to create the offices is implied by the authority given in the eight sections, or in the general municipal incorporation law, there is still no such limitation as to compensation in either. "No councilman shall be eligible to any other office during the period for which he was elected" is also a provision of section 16, not to be found elsewhere in any municipal laws applicable to Palatka. Section 17 gives power not only to regulate, but to prohibit and suppress, theatrical and other exhibitions, shows, parades, and amusements, and power to punish violation of municipal ordinances by fine to the extent of two hundred dollars, or imprisonment to the limit of three months. No such power as to suppressing or prohibiting theatricals and other amusements is to be found in the eight sections or the general municipal statute, and though the maximum limit of fine prescribed by the latter is five hundred dollars, the maximum imprisonment is only sixty days.

It is apparent from the above review of the genuine and of the spurious sections, and of the general municipal law, as adopted by one of the former sections, that the same special objects are provided for in a different manner in the two parts of the ostensible law. The two parts are connected in subject-matter. Had they both been actually enacted by the legislative power, and there were some defect of procedure as to the ninth and subsequent sections, vitally affecting their force as law, but no such informality as to the first eight sections, could it be said that the law-making power would have adopted the eight sections without the others? In so far as the express provisions of the sections subsequent to the eighth are inconsistent with those preceding them, or with the general municipal law, they would, if valid, control; and this rule each branch of the law-making power must be conclusively presumed to understand. Where the provisions of the valid and invalid parts of a statute are connected in subject-matter, and are such that they depend on each other and operate together for the same purpose, or are otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other, the whole act falls. The same result must, even more unquestionably,

follow, where the invalid provisions are of such a character as that, were they valid, they would overcome or nullify the provisions of the valid part on the same subject.

It is true that if a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. The purpose in the case before us was to revoke the existing government of a city, and establish a municipality with altered powers, and in so far as both the time when the powers were to become operative, and what they should be, the provisions of the spurious portion of the act are entirely different from those of the other part.

It is a rule that if, when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained; and this rule is relied upon as one which supports the eight sections as an independent valid law: Cooley on Constitutional Limitations.

If the meaning of this rule be, that when the provisions of the genuine parts are such as to sustain an enforcement of the legislative intent shown by them, considered of themselves, they are to be sustained, although there may be in the invalid parts provisions on the same subject which indicate a different legislative intent, then, doubtless, the eight sections are valid. Such, however, is not the meaning of the rule. Its meaning is, that when there is in the invalid portion nothing which shows a different legislative intent as to the subject-matter of the genuine parts than is shown by the latter, and the latter parts are sufficient to secure or authorize an enforcement of this intent (or in other words, their own execution), without the aid of whatever there may be in the invalid parts, the genuine parts will stand.

A consideration of the cases cited by Judge Cooley, from whom we get the rule as expressed, will elucidate its meaning.

In *State ex rel. v. Commissioners of Perry Co.*, 5 Ohio St. 497, the facts were, that a statute had been passed in 1853 which, by its first section, provided for the removal of the county seat of Perry County from New Lexington to Somerset, in case the

majority of the electors voting at the next general election should vote in favor of such removal. The manner of voting on the question at such election, and of canvassing the votes and certifying the result, was prescribed by subsequent sections. The fifth section of the act provided that if a majority of the electors should vote against removal, the county commissioners should surrender certain obligations which had been previously given to them under an act of 1851 to secure the payment of money to erect county buildings at New Lexington, to which place the county seat had been removed from Somerset, pursuant to an election held under the act of 1851. It is perfectly clear that the provisions of the act, other than the fifth section, which imposed a forfeiture, and was of itself unconstitutional, were, when considered of themselves, or independent of the fifth section, operative or capable of being enforced; yet the whole act was held invalid. "The provisions of the fifth section," say the court, "are such as would naturally influence the vote upon the adoption of the first and main section, and it would be a fraud upon the voters of Perry County to procure their adoption of the first section by means of the threatened penalties of the fifth, and then declare the fifth section void, but allow it to accomplish its purpose by giving vitality and effect to the first, which without it would never have been adopted. The provisions of both sections are made equally to depend upon the result of the election; they were submitted by the legislature collectively to the voters, and could only be passed upon as a whole, and must therefore stand or fall together."

In *Slausson v. Racine*, 13 Wis. 398, the first section of the statute provides that certain lands in Racine township and adjacent to the city of Racine shall be annexed to the city; and the second section defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes at a different and less rate than other lands in the city. If lands are annexed, "they must," says the opinion, "be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a

compensation for the annexation, and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other, and that they would not have annexed them unless they had supposed that effect could be given to the proviso." There is no doubt but that the act would have been operative to annex the lands, if it could be considered as entirely independent of the intent shown by the unconditional proviso.

These and other cases cited by Judge Cooley show that his meaning is what we suggest it to be: Cooley's Constitutional Limitations, 212.

It is apparent that the eight sections are neither complete in themselves nor capable of being executed in accordance with the legislative intent, as such intent appears from the whole act. The two parts are not wholly independent of each other; the effect of one is overcome by the provisions of the other. In each of the two parts are provisions in the same features of a single scheme.

If there were in those sections which were not adopted by the two houses of the legislature no provisions inconsistent with either the preceding eight sections, or with the provisions of the general municipal incorporation law, a case would be presented in which the eight sections would stand as a valid enactment; for we could then see and would be authorized to say that they exercised no influence upon the governor in the performance of his function of approving the bill. If, moreover, the ninth and subsequent sections related to some entirely distinct matters or features of which those of the eight sections were entirely independent, the same conclusion might be reached; but as the case stands, it is clear that the matters and purposes of the provisions of the two parts are not only not independent, but in some cases the matters are identical, and a different purpose as to them, or as to how they shall be effected, is undeniable.

No presumption inconsistent with the view that the governor considered and approved the bill with the belief that all its parts had received the legislative sanction indicated by the signatures it bore, and that he ratified it as a whole, is permissible. However much more the bill may secure the commendation of some without the ninth and subsequent sections than with them, it cannot be held that the provisions of these sections, so inconsistent as they are with those of the former relating to the same subjects, did not influence his judgment.

and secure his approval of the measure. We cannot say what his action would have been had they not been before him as a part of the ostensible perfect bill submitted for his official action; nor can we affirm that in case of his vetoing the bill if it had not had the ninth and subsequent sections, that the legislature would have passed it over the veto. Whether he would have approved, vetoed, or permitted it to become a law without his signature, or what would have been the action of the legislature in case of a veto, is necessarily a matter of speculation.

It cannot be said that the governor is no part of the law-making power; he is made a part by an express provision of the constitution, section 28 of article 3. His participation in the making of laws is expressly provided for as an exception to the general prohibition of the second article of the constitution against any person properly belonging to one department of the government exercising power appertaining to another department. By such section 28, every bill that may have passed the legislature must, "before becoming a law, be presented to the governor; if he approves it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated," and a two-thirds vote of the members present in each house is necessary to make it a law against such objections. If any bill shall not be returned within five days after it is presented to the governor, or if it shall not be filed by him in the office of the secretary of state in ten days after the adjournment of the legislature, should that body adjourn before the expiration of the five days, it is true the bill shall be a law in like manner as if he had signed it, yet the spirit of these limitations as to time was not to either disparage the importance of the functions of the governor as to legislation, or relieve him from a faithful performance of his duty in considering and forming an intelligent opinion of the bill presented, but it was to secure promptness of action on his part, and in the case of the ten-day limitation, the purpose was also to extend his powers as to legislation beyond the end of the session of the legislature, whereas without it his powers would have expired with the session. The purpose of the section of the constitution was to require of the governor careful consideration of every bill before it can become a law, and the exercise of his judgment as a public official as to the wisdom of the proposed legislation in the light of public interest, and to require an indication of such judgment by express approval,

or by silent acquiescence after investigation, or by express disapproval. The authorities speak of the governor as being a component part of the law-making power in the exercise of these functions: *Fowler v. Pierce*, 2 Cal. 165; Cooley's Constitutional Limitations, 184.

In May, 1887, Governor Perry asked the opinion of the justices of this court (if it could be properly required) as to his duty to disapprove certain bills as beyond the power of the legislature to pass at its then pending session, though otherwise unobjectionable. The constitution makes it our duty to interpret the constitution, at the request of the governor, upon any question affecting his "executive powers and duties." We declined to give the opinion because the question asked affected a legislative, and not an executive, duty of the governor. Chief Justice McWhorter, speaking for the several justices (23 Fla. 298), said: "Is the opinion you desire one relating to your 'executive powers and duties'? The exact legal meaning of the word 'executive' has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution before the duty of executing it can exist. Any duty imposed by the constitution on the governor with reference to a bill before it becomes a law is not an executive duty. The enactment of laws is a legislative duty, and when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed by you as a part of the law-making power, and not as the law-executing power."

If the provisions are not meaningless, why is he not a part of the law-making power? Both the approval of and the silent acquiescence in a bill involves the consideration of its provisions, and so does a disapproval. A failure to approve or to veto cannot be regarded as an omission to consider the bill, but can be regarded only as a silent acquiescence after careful consideration of all the provisions of the bill; any other theory imputes to the governor absolute dereliction of duty. No bill can be approved or disapproved without an opportunity to consider it, and the consideration and approval or disapproval of a bill of one import or effect does not even involve an opportunity to consider another bill of substantially different legal import or effect. Unless substantially the same bill as was passed by the legislature is submitted to the governor for his

approval or disapproval, it cannot become a law either by his approval or silence, or against his disapproval, and this is so, because the constitution requires that before a bill can become a law it must be submitted to the governor.

No bill of the same import or legal effect as the first eight sections has ever been presented to the governor for his action; and if we should sustain these sections, we would do so without his ever having had an opportunity to act upon them as a governmental measure of the import and effect which they, of themselves, carry. There, then, is no difference between this case and one in which an entirely distinct bill of the same legal effect as the eight sections qualified by the other twenty-three sections had been presented to him.

The authorities cited above are consistent with each other, and affirm the invalidity of the first eight sections.

Whenever an ostensibly perfect bill is submitted to the governor for his action as a part of the law-making power, and he considers and approves its several parts collectively, and with the idea that they are all valid, and it subsequently appears that some of them are spurious, a court should hesitate before pronouncing any of its parts to have the force of law, and should not give them such effect, unless it is entirely clear that the spurious parts are such as could not have influenced him to approve the other parts, or in other words, unless the latter are entirely severable or distinct and independent from the former. Any other rule must result in trespass by the judicial department upon the legislative domain, and encourage, not only negligence, but even efforts upon the part of interested evil persons to secure the interpolation of matter which they might think would overcome some known executive objection, and yet not defeat the genuine parts of the bill.

The first eight sections, as well as the others, are void.

The motion to quash the return is denied, and the judgment of the court will be, that the respondent go without day, and recover his costs to be taxed by the clerk: *State v. County Commissioners Sumter Co.*, 22 Fla. 364, 370. It will be so ordered.

THE CHIEF JUSTICE dissented on the question whether the act in question, in view of the evidence concerning its passage, had constitutional standing as a legislative enactment. He cited *Cooley's Constitutional Limitations*, 163, *Gardner v. Collector*, 6 Wall. 499, *Spangler v. Jacoby*, 14 Ill. 297, *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69, *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640, as authorities to the effect that legislative

journals and papers may be resorted to for evidence of action on bills which become laws, to ascertain if they have been passed in accordance with constitutional requirements; and if it appears therefrom that they have not been so passed, they are void. In reference to the act in question, he agreed that it was clearly shown that the first eight sections of the approved act are the only ones which can have any validity, and that the remaining twenty-three sections are void, and that the question, therefore, was, whether the eight sections were valid, or the whole act void.

The cases of *Jones v. Hutchinson*, 43 Ala. 721, *Mood v. State*, 48 Id. 115, 17 Am. Rep. 28, *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647, *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69, all of which are cited in the principal opinion, are commented on, and the rule drawn, that statutes may be void in part and valid in part, and if the valid part is severable from the void portion, the courts will sustain the former as if passed separately from the latter; and so long as the genuine portion is complete in itself, no reason appears why this doctrine should not apply to all statutes alike, no matter what the ground of invalidity of the void part. The courts say that the void part may be stricken out, and if what remains can be enforced, independent of the part struck out, that much must be upheld; but it would be inconsistent to say that this is unauthorized, if the act is void for one reason, while if void for another a different rule must prevail, and if in a case like the present, as well as where the whole act was passed, it would seem like making a distinction without a difference to declare the former void and the latter void only as to the spurious parts.

On the question that the conclusion which sustains the act in question disregards the rights of the governor; that as a component part of the legislature his action is directed solely to the consideration of the bill presented to him; and that if approved by him, it must be considered a bill that in its entirety duly passed the legislature, otherwise no bill at all, — his honor enters an emphatic dissent, and thinks that such a doctrine rests upon a misapprehension of the relations of the governor to legislation. The constitutional provisions which connect the governor with legislation do not convey the idea that he is a component part of the legislature. The legislative, executive, and judicial departments of the government are independent, distinct, and separate from each other, except so far as the constitution checks and restrains encroachments upon each, or upon the rights of the people. In speaking of these departments he said: "Each acts for itself within its sphere; and when they are brought in connection, as the governor and legislature are in the passage of laws, or in contact, as the judiciary may be with the others in its authority to pronounce upon their acts or proceedings, it is chiefly in the way of restraint or check upon each other. . . . It is the function of the legislative department to pass laws, and that function is subject to no restraint except the veto of the executive. When an act is passed and presented to the governor for his approval, it is not because that approval is necessary to make it a law; for it becomes a law irrespective of his approval if he does not challenge it by a veto, and even if he vetoes it it may become a law independent of him by a two-thirds vote of the two houses of the legislature. It is clear, therefore, that the governor's agency in the passage of laws is not affirmative, but only a sign that he has no veto to interpose." This being the rule, his approval of a bill, a part of which only has been passed by the legislature, and containing other parts not passed, does not fail to make law of the parts passed. The only reason given against this is, that

the bill presented to the governor was not that which passed, though included in it, and therefore wholly void.

"How that makes the question of the part passed, if it can stand by itself, different in principle from the case of a bill all of which was passed and approved, but some of it void, while the rest may be sustained," cannot be conceived. Such a rule would be against the analogies of the law, and in view of the mischief which might be done under it, either by evil design or clerical mistake, good reason will not uphold it.

Applying these views to the act in question, the inquiry is, says his honor, "whether, if all the sections after the eighth is stricken out, a law is left, complete in itself, answering the intent of the legislature, and in no wise dependent on these sections, or any of them. *Prima facie* there would be such a law, for those eight sections constitute the law as it actually passed the legislature. But looking to the act itself, I come to the same conclusion. . . . Taken together, they constitute a law complete in itself, and answering the purpose of reorganization expressed in the title of the act. I think, therefore, that these eight sections, disencumbered of the others, should be sustained as the act passed by the legislature, signed by its officers, and approved by the governor."

STATUTES. — Statutes may be good in part and void in part; and if the part which is good is entirely distinct and severable from that which is void, the former will be upheld independently of the part which cannot be enforced: *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446; 20 Am. Rep. 69. Where a statute is void in some of its provisions, but valid in others, the whole statute will fall, if the various provisions are so intermingled and mutually dependent, one upon the other, as to raise the presumption that the legislature would never have passed the statute unless it believed the whole could stand as valid and constitutional: *O'Brien v. Krenz*, 36 Minn. 136. A statute is not void for duplicity of title and objects, where the title does no more than add a notice of a repealing clause, which repeal would arise by implication upon the passage of the act in question: *Tolford v. Church*, 66 Mich. 431.

STATUTES, CONSTRUCTION OF THE VARIOUS PROVISIONS OF — RECENT CASES. — The general rule as to the construction of statutes is, that force and effect must be given to every part of the act, if such can be done without any injury to the intention with which it was enacted: *Wegner v. Taylor*, 39 Kan. 754; *San Diego v. Grannis*, 77 Cal. 511.

STATUTES CONTAINING SEVERAL PROVISIONS, SOME OF WHICH ARE VOID: Compare *Ex parte Bryant*, 24 Fla. 278; *ante*, p. 200, and notes.

STATUTES — ACTS OF THE GOVERNOR. — As to what are ministerial duties of a governor, see extended note to *Haskins v. Governor*, 33 Am. Dec. 361-368.

McWHORTER v. PENSACOLA AND ATLANTIC RAILROAD COMPANY.

[24 FLORIDA, 417.]

SUIT AGAINST STATE. — The rule which forbids suit against state officers because it is in effect a suit against the state applies only where the interest of the state is through some contract or some property right of hers involved, or where her interest is in a suit brought or threatened by her officers in her own name, to enforce some alleged claim of hers.

SUIT AGAINST STATE — RAILROAD COMMISSIONERS. — Where a statute provides that railroad commissioners shall make and fix reasonable and just rates of freights and passenger tariffs to be observed by all railroad companies doing business within the state, and shall as soon as practicable furnish each company with a schedule of such charges, a suit to enjoin such commissioners from enforcing such charges, on the ground that they are unreasonable and unjust, is not in itself a suit against the state; but as the statute provides a penalty for the violation of such rates as fixed, and directs such commissioners to sue in the name of the state to recover the penalty, if the bill for an injunction also prays that they be enjoined from instituting such suit, it becomes, in effect, an action against the state, and cannot be maintained.

INJUNCTION — REMEDY — RAILROAD COMMISSIONERS. — The discretionary action of executive officers will not be enjoined. Some other remedy must be sought; and where railroad commissioners are, by statute, vested with discretionary powers as to fixing rates of freight and passenger tariff, they are within this rule.

REMEDY — INJUNCTION — RAILROAD COMMISSIONERS. — Where a statute provides that railroad commissioners shall fix rates of freight and passenger tariff, the question whether such rates are unreasonable and unjust, and the statute therefore unconstitutional and void, cannot be inquired into in a suit to enjoin their discretionary action in fixing such rates.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER. — Where a statute delegates power to a railroad commission to fix just and reasonable rates for freight and passenger tariff, to be observed by railroad companies, such statute is not unconstitutional as being a delegation of legislative power and control.

C. M. Cooper, attorney-general, for the appellants.

W. A. Blount, for the appellee.

THE CHIEF JUSTICE. Appellants are commissioners under an act of the legislature of Florida of 1887, "to provide for the regulation of railroad freight and passenger tariffs in this state; to prevent unjust discrimination in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations, and lessees in this state from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

They bring this case here for a reversal of the decree overruling their demurrer to the bill of the Pensacola and Atlantic Railroad Company against them, which also enjoins them from "promulgating as binding upon the complainant the rates for transportation of freight and passengers heretofore prescribed by the defendants for the complainant, or other rates substantially the same as said rates, and from procuring or permitting the institution of any suits against the complainant for any alleged charges by the complainant in excess of the said rates heretofore fixed, or in excess of any other rates which may be fixed by the defendants for the complainant substantially the same as the said rates."

The *gravamen* of the bill is, that the Pensacola and Atlantic Railroad Company is a corporation of the state of Florida, empowered to construct and operate a railroad from some point on the Apalachicola River to the city of Pensacola; that the road was completed and began to operate in April, 1883, and has been operated ever since; that the defendants were appointed commissioners under the act above mentioned; that they have fixed rates for freight and passenger transportation on the railroads of the state, including that of complainant, which they have determined to be just and reasonable charges to be made by said railroads, and have ordered the several companies, including complainant, not to make any charges greater than the rates so fixed; that they have fixed three cents per mile as the uniform rate to be charged by complainant for passengers, and have fixed rates for freight varying with the distance of transportation, and with certain classification of the various kinds of freight, which they have arbitrarily adopted; that the rates thus fixed were made in spite of facts hereinafter stated and argument thereon before defendants; and as authorized by the act, complainant protested to defendants against the enforcement of said rates, but the defendants refused to change the same, and thereupon complainant appealed to the board of revisers provided by the act, but that board confirmed the action of defendants; that complainant, for reasons hereinafter stated, declined to adopt the rates thus prescribed, and have charged for passengers and freight more than said rates, but the rates so charged were just and reasonable, and in no instance has it made a charge that was not just and reasonable, never having charged for passengers more than five cents per mile, the rate authorized by its charter; that consequent upon such charges by

complainant, which defendants allege to be in violation of the act and of their order, they demanded that complainant restore to the persons so charged the excess over the rates fixed by them; and upon complainant's refusal, they have procured the attorney-general of the state to bring several suits (naming them) to recover the penalties prescribed by the act for charges in excess of rates so fixed; that numerous persons who have been charged by complainant more than the rates fixed by defendants, relying on the authority of defendants to fix rates, have brought suits against complainant to recover damages for said alleged excessive charges; that said suits of the state and of the said persons are now pending, and the defendants announce their intention to procure other suits to be brought by the attorney-general for every case of a charge by complainant in excess of the rates fixed by them, and that there are numerous cases of such excess, and complainant will continue to so charge until it be judicially determined that it has not the right to do so; that defendants have not the power to determine the justice or reasonableness of complainant's charges, because that involves a judicial function which they are inhibited from exercising by the constitution of the state; that if not judicial, it is legislative, and cannot be exercised by defendants; that if defendants have any power whatever in the premises, it is restricted to fixing rates that are in fact just and reasonable, and they cannot require complainant to reduce its rates to charges which are not reasonable and just to it; and that the rates prescribed by defendants are much less than those heretofore charged by complainant for the same services, and are neither just and reasonable; for though its charges have been much greater than is allowed by the rates fixed by defendants, and have brought a much larger gross income than would be realized from said rates, yet complainant has not only failed to realize any interest upon its investment, but has failed to realize enough to meet the necessary expenses connected with the operation and ownership of its road.

The bill then proceeds to give figures and statements as to the cost of construction and equipment of the road, and its actual value, and as to earnings and expenses of its operation, going to show excess of expenses over earnings, and actual loss from the operation of the road during the more than the five years of such operation to date; and alleges facts in regard to the condition and business of the country through

which the road runs to show that such loss, even on the basis of its charges, will probably continue for some years. It further alleges that the rates prescribed by defendants are also unreasonable and unjust, when compared with those permitted by them to other roads in the state, giving figures to show the difference; and that a reduction of its charges to the rates prescribed by defendants would compel complainant to forego any possibility of earning any interest on its investment, or any income from the operation of its road, and that to continue the operation at an actual loss would render its road valueless; and that defendants cannot, under the law, so act as to produce this result, for thereby complainant would be deprived of its property without due process of law, contrary to provision of section 1, article 14, of the constitution of the United States. The prayer of the bill was for the relief which was granted by the injunction.

On the argument of the demurrer to the bill, the commissioners filed an affidavit, intended mainly to show that, in their dealings with complainant, they were not led to expect such complaints as the bill makes, and they say that if application had been made to them for a change or increase in the rates, and it had appeared to them reasonable and just, they doubtless would have made proper changes, as they did in cases of application by other roads.

The preliminary question raised by the demurrer arises on two of its grounds, the third and fourth, viz.: 3. That the court has no jurisdiction of the matters set forth in complainant's bill, or to grant relief in the premises; and 4. That this is in effect a suit against the state.

We will consider first whether this is in effect a suit against the state. If it is, it is well understood that it cannot be sustained, unless by consent of the state. The objection springs from the rule that a suit against officers of the state, founded on any claim or complaint, the adjudication of which against the officers would be in effect an adjudication against the state, is a suit against the state. In *Osborne v. Bank of the United States*, 9 Wheat. 738, and *Davis v. Gray*, 16 Wall. 203, the court announced that it would look only to the record to determine whether the state was a party. But in subsequent cases, this test is treated as too narrow, and cases against officers were held to be cases against the state, although not named on the record: See *Louisiana v. Jumel*, 107 U. S. 711; *Cunningham v. Macon etc. R. R. Co.*, 109 Id. 446; *Hagood v.*

Southern, 117 U. S. 52; and *In re Ayers*, 123 Id. 443. In the *Virginia Coupon Cases*, 114 Id., the state being interested, but the court holding she was not a necessary party, it was nevertheless said in its opinion, "that the question whether a suit is within the eleventh amendment is not always determined by reference to the nominal parties on the record." And conversely, in the cases of *New Hampshire and New York v. Louisiana*, 108 Id. 76, the court refused to sustain a suit of one state against another, although the constitution of the United States authorizes such a suit, because it appeared that while on the record the states suing were the nominal parties, yet they were acting for some of their citizens, who were the real parties in interest, and who could not themselves sue the state, being within the prohibition of the eleventh amendment.

It cannot be said, therefore, that the case under consideration is not a case against the state simply because the record does not bear her name, and, indeed, there has been no contention to that effect. So the question is, whether the case comes within any class in which a suit against officers is of such a character that a judgment or decree cannot be given in it without affecting some right or interest of the state, so that the effective operation of the judgment or decree is really against the state rather than the officers sued. In other words, Would a decree against these commissioners be a decree against the state as the actual party?

The only cases in the supreme court of the United States in which it has been held that a suit against officers or others is a suit against the state are *Louisiana v. Jumel*, *Cunningham v. Macon etc. R. R. Co.*, *Hagood v. Southern*, and *In re Ayers*, all cited above. We need only analyze these so far as to show the nature of the question involved in each. The first, *Louisiana v. Jumel*, was an attempt of bond creditors of the state to protect and enforce their rights under the law of 1874, which provided for the issue of the bonds they held, and under an amendment to the constitution of the same year, which ratified the law, as against an ordinance of the new constitution of 1879, which stopped the further levy of the tax that this law authorized for the purpose of raising revenue to pay interest on the bonds, and also prevented the disbursing officers from using funds in the treasury derived from previous levies for paying such interest. The suits were against officers of the state. It was not denied that this ordinance was uncon-

stitutional, because impairing the obligation of a contract of the state; but the court held that the suits could not be sustained, for the reason that the execution of her contract could not be enforced by a suit against her officers to which she was not a party. The case of *Cunningham v. Macon etc. R. R. Co.*, 109 U. S. 446, was for the foreclosure of a mortgage to secure bonds issued by the company. Prior to its institution the state of Georgia had gone into possession of the road, and was still in possession under purchase at a sale made on account of her lien to secure her indorsement of other bonds of the company. The court held that her interest in the property made her a necessary party, and it refused to entertain jurisdiction of the case, as she could not be sued without her consent. The case of *Hagood v. Southern*, 117 U. S. 52, was a suit against officers of the state of South Carolina, on bond scrip issued by the state, which declared on its face that it was receivable "in payment of all taxes and dues to the state," to compel its receipt for taxes. This was held to be a suit that could not be maintained, because the state could not be compelled to perform her contract by a suit against her officers. The case of *In re Ayers*, 123 U. S. 443, was on a writ of *habeas corpus*. A bill had been filed to enjoin officers of the state of Virginia from prosecuting suits in the name of the state against the tax-payers reported to be delinquent, for the recovery of their taxes, the *gravamen* of the bill being that they refused to receive coupons of the state for taxes, though made receivable by law, and that this was a violation of the contract of the state, but that under a subsequent law, suits were threatened against those who tendered the coupons, and would not otherwise pay their taxes. An injunction was granted, which the officers disobeyed, and they were put into custody for contempt. The writ of *habeas corpus* was for their relief. The court discharged the parties, holding that though the suits threatened might be a breach of the contract of the state, yet the injunctions should not have been granted, because the actual party upon whom it operated was the state, and not the officers who were sued; and there being no jurisdiction against the state, the injunction was void, and did not furnish legal ground for the imprisonment.

The court refused jurisdiction of two of these suits because they involved state contracts; of the third, because it involved property of the state; and of the fourth, because, although the foundation of the suit involved a contract of the state, the im-

mediate proceeding was to relieve her officers from punishment for doing in her name that which, when done, would be her own act.

Looking to cases we find in the state courts, they are substantially of the same nature. That of *State ex rel. Hart v. Burke*, 33 La. Ann. 498, was a suit presenting in part the same questions as those in *Louisiana v. Jumel*, *supra*, and was decided adversely to the plaintiff, on the ground that if he had contract rights against the state they could not be enforced by a suit against her officers, she not being a party. In *Weston v. Dane*, 51 Me. 461, *Marshal v. Clerk*, 22 Tex. 23, and *Houston etc. R'y Co. v. Randolph*, 24 Id. 317, similar decisions were given, the cases being against officers on pecuniary claims against the state; and similar decisions in *Printup v. Cherokee R. R. Co.*, 45 Ga. 365, and *Hosmer v. De Young*, 1 Tex. 764, being cases in which property claimed by the state was involved.

It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers, because in effect a suit against the state, applies only where the interest of the state is through some contract or some property right of hers, or where her interest is in a suit brought or threatened by her officers, in her own name, to enforce some alleged claim of hers. And it is important to observe the character of the interest. It is not enough that the state should have a mere interest in the vindication of her laws, or in their enforcement as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity,—of value in a material sense. She has an interest in the success of the policy of her laws, and in the just administration and execution of those laws, yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, when it is not an otherwise and more direct interest inhering in some separate right, or claim of right, of her own.

With this distinction in mind, how stands the present case? The fifth section of the act constituting the office of the commissioners provides that they shall "make and fix reasonable and just rates of freights and passenger tariffs to be observed by all railroad companies doing business in this state on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this state, as to charges at any and all points for

the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this state; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations to be observed by said railroad companies on said railroads, to prevent giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner, as to the real rates charged for freight and passengers."

The sixth section authorizes and requires the commissioners to "make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads, and said schedules shall, in [any suit] brought against any such railroad corporations wherein is involved the charges of any such railroad corporations for the transportation of any passengers, or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads, and said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules." There are other provisions in these sections which it is needless to recite.

The principal complaint of the bill against the commissioners is, that in performing the duty imposed on them they exceeded the authority given by the act, and fixed rates for the road of the complainant that were not reasonable and just; that if said rates are enforced, the road will be operated at a loss, to such extent as will render the property valueless; and that this amounts to a violation of the state constitution which forbids the taking of private property without just compensation, and also of the constitution of the United States, in that it deprives complainant of its property without due process of law. There is here nothing that affects the state in any valuable interest of her own, or affects her otherwise than as she is concerned in having a law of a public nature carried out. Clearly, then, according to the test we think the law applies, the state bears no such relation to this subject-matter of the

suit as renders her in effect a party to it, and if the injunction sought had been limited to staying the action of the commissioners in regard to rates only, the objection that she is a party would not obtain.

But the bill goes further, and founds a complaint against the commissioners in connection with section 17 of the act, which provides a penalty against any railroad company for violating the rules and regulations prescribed by them, and directs that they shall institute action through the attorney-general to recover the penalty. Admitting violation of the rate regulations prescribed for it, the company, resting on alleged want of authority in the commissioners to fix for it the rates they did, prays that they be enjoined from instituting the action authorized. A further direction of the act is, that the suit "shall be in the name of the state of Florida." It needs no argument to show that in such a suit the state is a party, and that the injunction asked against the commissioners to stay the suit would be an injunction in fact against her. It is precisely the case which led to *In re Ayers, supra*, where officers were enjoined from bringing suits in the name of the state, which was held to be void, because in fact an injunction against the state, the court saying, if "officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

There is a class of cases against officers in which suits are held to be allowable, although the officers were acting under orders or authority of the government. This is where they exceed their authority, and in their action commit a tort. "In these cases [the officer] is not sued as or because he is the officer of the government, but as an individual": *Cunningham v. Macon etc. R. R. Co.*, 109 U. S. 446.

There is another large class of cases in which suits against officers of the state have been sustained, though it was to enforce obligations of the state, or to compel performance of some act authorized by law of the state in behalf of any one who may have had a substantial interest in its performance as an act on the part of the state. Thus where a statute makes an appropriation of money out of the treasury of the state for a certain defined purpose, and directs its payment by the proper officer, leaving in him no discretion to be exercised in regard to its payment, the party entitled may, on refusal of the offi-

cer to pay him, have a writ of *mandamus* against him to compel the payment, and the state need not be a party: High on Extraordinary Legal Remedies, secs. 101, 104. So, as to the performance by an executive officer of any ministerial act for the state not requiring the exercise of discretion: Id., secs. 107, 110, 127.

This is sometimes treated in the discussion of cases as if connected with the non-liability of a state to be sued, and as an exception to the rule which forbids a suit against her through her officers; but we think this is not strictly correct, and that in this country at least, in regard to executive officers, an entirely different question is involved, to wit, the authority of one department of the government, as constituted here, to interfere with the functions appertaining to another. And we treat the case before us in this view, so far as it depends on the point raised by counsel growing out of this doctrine.

The point referred to is, that while in the class of cases just mentioned a suit against an officer refusing to act will be sustained, on the ground that the law speaks to him as a ministerial officer, without discretion as to the thing directed to be done, on the other hand, if the law invests him with discretion in doing it, the courts will refuse to interfere with that discretion: *Towle v. State*, 3 Fla. 202; High on Extraordinary Legal Remedies, secs. 42, 80. This is not contested by the opposing counsel; but he meets it on the ground that "the whole gist of the railroad company's case is, that the commission have no discretion which authorizes it to fix rates in the manner fixed in this case; [and] admits that if the act of the legislature gives it such scope, its discretion is absolute between the nether limits of a living interest upon the investment and the upper limit of attainable profit, but it cannot go below the nether limit, for then it trenches upon constitutional rights. When there is no power, there can be no discretion, and the commission reaches the limit of its power when in its downward course of reduction it reaches the point where a further descent would deprive the railroad company of a just compensation for its property."

There is no denial, and could be none, as will be evident from a slight consideration of sections 5 and 6 of the act quoted above, that it gives discretion to the commissioners in the fixing of reasonable and just rates, and hence this qualified denial is but saying that the commission exercised its

discretion to a wrongful extent. It may be granted that if, by enforcing the rates complained of, the company would have its property taken without just compensation, or would be deprived of its property without due process of law, the first would be a violation of the constitution of the state, the second a violation of the constitution of the United States, and that neither the legislation nor the commission under her law could do either. But we are not at this point called upon to say whether such would be the effect of those rates, or whether the court has authority to adjudicate upon the reasonableness of the rates, or whether the judgment of the commission as to reasonableness is to be taken as conclusive. These are questions excluded from our consideration, by the fact that the law refuses authority to enjoin the discretionary action of executive officers. It does not matter that the exercise of the discretion works an injustice or wrong. In many of the reported cases,—that of *Towle v. State*, *supra*, for one,—the inhibition was held to apply, though the officer was legally wrong in the conclusion reached as to the rights of the party whose case was brought within his discretion. And we do not see that it makes any difference whether those rights are founded on mere legal protection or on constitutional protection. The simple test is whether the decision of the officer is one his discretion authorizes him to make, and if it is, the court is powerless to control him. Where this discretion exists, *mandamus* does not lie to direct the manner of its use, nor will injunction step in to control or intercept its use.

It is proper to say, however, that this restraint upon proceedings by the court does not intend a denial of the legal or constitutional rights of any person, but only that the party aggrieved must seek his redress in some other way than by a suit against the officer in fault. In the present case, for instance, if the commissioners have exercised their discretion in a manner to invade the legal or constitutional rights of the complainant, that will be available for defense in any action against said complainant founded on the violation of the regulations of the commissioners. This is clearly recognized in the case of *In re Ayers*, *supra*, where the court, though holding the injunction against state officers restraining them from bringing suits in the name of the state to be void, intimated that rights which could not be thus enforced could be protected in defense of suits against the injured party: See opinion, pp. 494, 495.

If the act creating the commission was unconstitutional and void, it may be that the commissioners, not in such case being officers, but only individuals really unclothed with office, would be subject to suit, as a void act could not confer any discretion on them; but its constitutionality is not contested, except against the extent of power claimed for the commission,—"the power of the legislature to create a commission with power to make schedules which shall be *prima facie* evidence of reasonableness of rates fixed by it," not being doubted by the company's counsel, save that "it cannot make them conclusive." In regard to this, it is said that a conclusive determination of the reasonableness of rates by the commission would be the exercise of judicial power, which is prohibited by the constitution of the state. But if this be so, it does not affect the question of the liability of those officers to the present suit. It does not remove the protection which they have by virtue of the discretion given to them to fix reasonable and just rates; a wrong exercise of that discretion, as we have said before, not varying the rule which relieves them from suit.

It is said further that if the power claimed is not a judicial one, then it is one that involves legislative power, and for that reason is prohibited by the constitution of the state. If this has reference to the conclusiveness of rates, as the connection would seem to indicate, what we have just said respecting the exercise of judicial power applies equally here. But if it is meant that the power to fix rates is so far legislative that it cannot be delegated to a commission, that presents a more vital question, and without considering whether it may be similarly disposed of, we go to its independent merits.

It may be remarked *in limine* that the power of the legislature to regulate and fix the charging rates of railroad companies chartered by the state, where the charter itself in a contractual view does not surrender the right to exercise the power, is not disputed; but that it is a power the legislature may forego exercising, and when it does that, it leaves its exercise to some other agency authorized by its law to act, to wit, this corporation. In many instances this is done as to all rates, and for the company before us it is done, except as to the maximum passenger rate. The regulating and fixing of rates, therefore, is not an inalienable exclusive function of the legislature. And if it may leave that to the corporation, why may it not delegate it to a different body? The public

interest involved is the same, whether reached by the corporation or by a supervisory commission.

We are not without authority on the question. Our act is taken almost entirely from an act of the state of Georgia. In the case of *Georgia Railroad v. Smith*, 70 Ga. 694, the constitutionality of the latter act was attacked, and on this subject of the delegation of authority to the commission was held not to be unconstitutional. The Georgia constitution, like ours, gave authority to the legislature to regulate rates. By the former, the constitution "conferred upon the legislature the power of regulating railroad freights and passenger tariffs, preventing unjust discrimination, and requiring reasonable and just rates of freight and passenger tariffs." By ours, "the legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties and forfeitures."

There is no material difference. The court says, in its opinion in the case cited above, that "it certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the state should be settled and determined by the legislature. The many influences that combine to cause changes in the ever varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the legislature just and proper schedules for the various railroads, with their differences of length, locality, and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so when it is remembered that schedules just and right, where arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the general assembly might, the succeeding year, well nigh bankrupt every railroad corporation in the state."

In *Tilley v. Savannah etc. R'y Co.*, 4 Woods, 427, the same question as to the constitutionality of the Georgia act was passed upon, the court discussing more fully the subject of delegation of authority to the commission to fix rates, and reaching the same conclusion. The reasons given are on the

line of those in the Georgia case. Thus: "The fixing of just and reasonable maximum rates for all the railroads in the state is clearly a duty which cannot be performed by the legislature, unless it remain in perpetual session and devote a large portion of its time to its performance. The question, what are just and reasonable rates, is one which presents different phases from month to month upon every road in the state, and in reference to all the innumerable articles and products that are the subject of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is largely given to the consideration of the subject. It is obvious that to require the duty of prescribing rates for the railroads of the state to be performed by the general assembly, consisting of a senate with forty-four members, and a house of representatives with one hundred and seventy-five, and which meets in regular session only once in two years, and then only for a period of forty days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice, in some cases to the railroad companies, and in others to the people of the state. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself is to defeat the purpose of that clause of the constitution under consideration."

Under a Mississippi statute creating a commission with supervisory powers over railroad rates, it was held to be constitutional by the supreme court of the state, and also by the supreme court of the United States, although there was vested in the commission authority to regulate and change rates: *Stone v. Yazoo etc. R. R. Co.*, 62 Miss. 607; 52 Am. Rep. 193; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307. The question of delegation of legislative power was not directly discussed in these cases, but was necessarily involved, and the authority given to the commission by the act to regulate rates could not have been sustained except upon the conclusion that such authority was constitutionally given.

Other cases announcing the same conclusion are *State v. Chicago etc. R'y Co.*, 38 Minn. 281, and *Chicago etc. R'y Co. v. Dey*, published in the Railway Age, August 3, 1888. We find no decision, and think there is no good reason, to the contrary.

There are cases upon similar statutes of other states where this question has been passed *sub silentio*, but this being only

indirect support of our conclusion, these need not be cited. We hold that the legislature, in the act under consideration, did not delegate to the commission any power so far its own exclusively that could not be delegated.

Under the views on which we decide this case, it is unnecessary to determine the other questions appearing in the record. The bill should be dismissed, and it is so ordered.

STATE, SUITS AGAINST. — Ordinarily, a state cannot be sued in its own courts, or in a foreign court, without its own consent, signified either by statute or some other unequivocal means: *Moore v. Tate*, 87 Tenn. 725; 10 Am. St. Rep. 712, and note 724.

OFFICERS. — The discretion of officers cannot be controlled or interfered with by *mandamus*: *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 249, and note 257, 258.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

HOOKENHULL v. OLIVER.

[80 GEORGIA, 89.]

DEEDS — EXECUTION OF DEED WITH BOND FOR TITLE — PRECEDENCE OF LATER RECORDED DEED OVER PRIOR UNRECORDED ONE. — The owner of land who conveys it by warranty deed to secure an indebtedness, taking a bond for title from his creditor, the grantee, has no remaining interest in the land except the right to redeem it. And if, for a valuable consideration, he afterwards makes a second deed to his creditor, whereby he conveys all his right, title, and interest in and to the property, warranting it against himself and any person claiming under him, this is sufficient to convey a perfect title to the grantee, and such second deed is not void because it failed to describe the amount of interest that the grantor had in the land; and being recorded in time, it takes precedence over a prior deed not recorded in time.

DEEDS — QUITCLAIM. — Whether one who buys land and takes only a quitclaim title can be an innocent purchaser, is held to be in some doubt, and to be a question as to which the authorities are conflicting, and is not determined in the particular case.

BILL in equity seeking to foreclose a deed as an equitable mortgage. The facts appear in the opinion.

George N. D. and P. Lester, for the plaintiffs.

W. D. Ellis and J. R. Gray, for the defendants.

SIMMONS, J. The record of this case discloses the following facts, as found by the presiding judge below, who, by consent of the parties, tried the case without the intervention of a jury: —

On February 9, 1875, J. S. Oliver and his wife, by warranty deed, conveyed to S. M. Inman, in fee-simple, a certain lot

situated in the city of Atlanta. This deed was recorded January 13, 1876. The purpose of it was to secure Inman in a loan of five thousand dollars which he made to Oliver; and Inman gave Oliver a bond for title to the land. On January 1, 1876, Oliver, with the consent of his wife, conveyed the same land to John Hockenhull by a deed similar to the one made to Inman. This deed was to secure Hockenhull from any loss by reason of his having become security for Oliver on a promissory note for eighteen hundred dollars, payable to Lawson Black. The land was warranted in the deed to Hockenhull to be unencumbered, except by one mortgage. Hockenhull, when he accepted this deed, knew of Inman's deed. Oliver received from Hockenhull a bond for title. On April 29, 1878, Oliver made a second deed to Inman, in which he bargained, sold, transferred, and conveyed to said Inman, his heirs and assigns, all his right, title, and interest in said lot, in consideration of eight thousand five hundred dollars, to have and to hold the same, with all the rights, members, and appurtenances to the same belonging or in any wise appertaining to him, the said Inman, his heirs and assigns forever, in fee-simple. The deed also contains a warranty against the grantor and all persons claiming under him. This deed was recorded May 6, 1878. The value of the property was found to be seven thousand five hundred dollars or eight thousand dollars. When Inman accepted it he had no notice whatever of the deed from Oliver to Hockenhull; there was an arrangement between Oliver and Hockenhull that Hockenhull's deed should not be recorded. It was recorded November 11, 1879. Hockenhull paid Black the note on which he was security. Upon the payment of the note, he filed this bill seeking to foreclose the deed from Oliver to him as an equitable mortgage.

Upon the trial of the case, the judge below found the foregoing facts, and decreed that Inman had the legal title to the property, and that it was not subject to Hockenhull's debt. The plaintiffs in error made a motion for new trial upon the several grounds stated therein, which motion was overruled by the presiding judge; and to this refusal to grant a new trial, the plaintiffs in error excepted, and assign the same as error. Only two questions were insisted on before us by the counsel for the plaintiff in error: 1. That the second deed from Oliver to Inman, being only a quitclaim, was sufficient to put Inman upon notice of a defect in Oliver's title, and he therefore could

not be a *bona fide* purchaser; 2. That the second deed was void for uncertainty.

1. As to whether a person who buys land and takes only a quitclaim title can be an innocent purchaser, is in some doubt. The authorities are very conflicting on the subject. But the view we take of this case renders it unnecessary to decide the question now. Inman obtained the first deed. It was recorded in the time prescribed by law. It conveyed to him a perfect legal title. He could have recovered on it in an action of ejectment. The only right or interest that Oliver had in the land was the right to pay the money borrowed of Inman, and to have it reconveyed to him, to redeem it. The record shows that he was unable to do this; and that Inman, without any notice of Hockenhull's deed, paid him three thousand five hundred dollars more and took the second deed, and that Oliver surrendered his bond for title to Inman. This, in our opinion, under the facts recited, gave Inman a perfect title. This brings us to the second point.

2, 3. It was argued that the second deed was void, because it did not describe the amount of interest that Oliver had in the land. We have shown that all the interest he had was the right to redeem it. He conveyed in his second deed all his right, title, and interest in and to the property, and warranted it against himself and against any person claiming under him. We think that was sufficient. Indeed it was the only kind of deed he could have legally made. It being a proper deed, and being recorded in time, it takes precedence over one not recorded in time, nor even recorded when this was made to Inman: Code, sec. 2705. He had already made an absolute deed conveying his title, and the only thing he could do was to convey or release his right to redeem. This he did, and we think it was sufficient. If we are right in this view, it follows, as a matter of course, that Hockenhull had no right as against Inman to foreclose his deed as an equitable mortgage, and that the presiding judge committed no error in so ruling.

Judgment affirmed.

VENDOR AND VENDEE. — WHEN BOND FOR TITLE INCORRECTLY DESCRIBES the land to be conveyed, the purchaser is entitled, in a proper case, to a correction of the bond; and the mistake may be established by parol evidence: *Goff v. Jones*, 70 Tex. 573; 8 Am. St. Rep. 619.

DEEDS. — ONE CLAIMING UNDER QUITCLAIM DEED is not a *bona fide* purchaser, within the recording act: *Taylor v. Harrison*, 47 Tex. 454; 26 Am. Rep. 304; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243.

RECORDED QUITCLAIM DEED TAKES PRECEDENCE of a prior, unrecorded, warranty deed of the same premises from the same grantor: *Brown v. Banner Coal and Oil Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316; *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603; *contra*, *Thorn v. Newsom*, 64 Tex. 161; 53 Am. Rep. 747.

WHEN RECORDED DEED HAS PREFERENCE OVER PRIOR UNRECORDED DEED: See *Younghood v. Vastine*, 46 Mo. 239; 2 Am. Rep. 509; *Marshall v. Roberts*, 18 Minn. 405; 10 Am. Rep. 201. A grantee under a recorded quitclaim deed was held to be subordinate to a prior unrecorded mortgage by his grantor: *Snow v. Lake*, 20 Fla. 656; 51 Am. Rep. 625; compare *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316.

REGISTRATION OF DEEDS — RECENT CASES. — Recording a deed is equivalent to a delivery thereof, in the absence of any fraud: *Levy v. Cox*, 22 Fla. 546. Recording a deed is constructive notice of its existence and contents to all subsequent purchasers: *Schwallback v. Chicago etc. R'y Co.*, 69 Wis. 292; 2 Am. St. Rep. 740. Registration is necessary to perfect the title of real property intended to be conveyed by a deed: *Respass v. Jones*, 102 N. C. 5. But an unrecorded deed is good as between the parties thereto, and all others who are not *bona fide* purchasers for value without notice: *Keen v. Schnedler*, 92 Mo. 516. The registration of a deed, upon proof of execution before a commissioner of affidavits, without any adjudication of the clerk of the superior court having jurisdiction, is invalid against creditors and *bona fide* purchasers: *Evans v. Etheridge*, 99 N. C. 43. Although a deed may be unrecorded, notice in other ways may exist whereby one may be precluded from claiming as a *bona fide* purchaser, without knowledge of the existence of such unrecorded deed: *Gardner v. Early*, 72 Iowa, 518. And where a purchaser's deed is unrecorded by the mere fault of the register of deeds alone, such purchaser's rights cannot be injured, even as to the claims of a subsequent purchaser, who has actual notice: *Pertine v. Strong*, 22 Neb. 725; *Lee v. Birmingham*, 30 Kan. 312. A *bona fide* purchaser, without notice of a prior unrecorded deed, may convey even to one who has actual notice of such deed, and the grantee will hold as good title as his grantor held: *Roll v. Rea*, 50 N. J. L. 264. The registration of a deed executed by J. N. H., in which he styles himself as J. H., by which latter name he is commonly known, is constructive notice to all persons: *Gillespie v. Rogers*, 146 Mass. 610. A quitclaim deed, if placed upon record, stands on the same footing as all other conveyances, and a *bona fide* purchaser therein is entitled to the same preference over prior unrecorded deeds: *Strong v. Lynn*, 38 Minn. 315; *Munson v. Ensor*, 94 Mo. 504; because a quitclaim deed is a regular, legitimate instrument of conveyance, and carries to the grantee therein whatever interest the grantor had in the premises: *Hopt v. Ketcham*, 54 Conn. 60. Registration of deeds is governed by the statutes of the state in which the realty purported to be conveyed is located: *Alford v. Jones*, 71 Tex. 519. A recorded deed is notice only to such persons as claim under the grantor in the recorded deed: *Jenkins v. Adams*, 71 Id. 1. An unrecorded deed is void as against purchasers without notice and creditors: *Paulk v. King*, 86 Ala. 332.

REGISTRATION OF OTHER INSTRUMENTS. — Registry acts in New Jersey do not apply to leases, and consequently the first in date stands first in right: *Hodge v. Giesse*, 43 N. J. Eq. 342. Unrecorded contracts for the sale of realty are void as against creditors: *Dobyns v. Waring*, 82 Va. 159.

DEEDS, DESCRIPTION IN — MISTAKE. — A misdescription in a deed does not affect its operation, if the property is so described that it can be identi-

fed: *Sherwood v. Whiting*, 54 Conn. 330. Where a conveyance erroneously describes the property, although it cannot pass title to the property described by mistake, yet the conveyance is a good executory contract, and can be reformed in equity upon proof of the mistake: *Margrave v. Melbourne*, 86 Ala. 270. But a mutual mistake in a deed as to the amount of land conveyed cannot be corrected, if, after discovering the mistake, the vendor receives the purchase-money and gave possession: *Wittbecker v. Walters*, 69 Tex. 170.

SHORE v. MILLER.

[80 GEORGIA, 98.]

NEW TRIAL — EVIDENCE, ADMISSIBILITY OF. — Where the brief used on a motion for a new trial sets out in specific terms the substance of a certain deed, the rejection of which, as evidence, constitutes a ground of the motion, this is a sufficient description of the deed to authorize the appellate court to pass upon the question of its admissibility in evidence, although the deed was not set out in full.

EVIDENCE. — PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO, CONTRADICT, OR VARY a writing, but is admissible to explain an ambiguity, whether latent or patent; as where a deed described the land conveyed thereby as being "parts" of certain lots, but not stating what parts, the deed itself, together with parol testimony, are properly admissible in evidence to show that the land covered by the deed was the same as that in controversy, and to which the claim was made.

W. I. Pike, for the plaintiff in error.

M. L. Smith and H. H. Perry, contra.

BLANDFORD, J. This was a claim case. Miller, as administrator of Carter, advertised for sale a certain place comprising several tracts of land. Shore interposed a claim to this land. On the trial of the claim case, Shore proposed to introduce in evidence a deed from Carter, the deceased, made in his lifetime to his wife, Nancy Carter. This deed described the land conveyed to her as being "parts" of certain lots of land, in all comprising 172 acres, but not stating what parts of said lots. Objection was made to the introduction of the deed in evidence, and the court sustained the objection. The claimant proposed to prove by parol that the land mentioned in this deed was the identical land which the administrator was proposing to sell, and to which the claim was made. The court below refused to allow this evidence. The jury found a verdict for the administrator. Shore, the plaintiff in error, moved for a new trial, which was refused; whereupon he excepted, assigning error on the refusal of the court to admit in evidence the deed from Carter to his wife, and the parol testi-

mony offered to show that the land the administrator was proceeding to sell, and to which the claim was made, was the same land mentioned in the deed. This is the only ground it is necessary for us to pass upon.

1. The defendant in error insists that we cannot take notice of this ground, for the reason that the deed is not set out in the bill of exceptions, but appears only in the brief of evidence on the motion for new trial, and that, as it was not admitted in evidence, it cannot be considered. We cannot agree with this view of counsel for the defendant in error. The motion for new trial sets out in specific terms the substance of the deed, giving the names of the grantor and grantee, the county and district in which the land was located, the numbers of the lots of which it stated these tracts were "parts," and the quantity of land conveyed; and we think this was a sufficient description of the deed, and that it was unnecessary to set out a copy of the entire deed.

2. We think the court erred in refusing to allow the deed to go in evidence, upon proof that the land mentioned in the deed was the same land offered for sale by the administrator and claimed by the claimant. We think this parol evidence offered by the claimant to show that it was the same land ought to have been admitted, and the deed thereupon allowed to go in evidence. While parol evidence is not admissible to add to, contradict, or vary a writing, yet it is admissible to explain an ambiguity, whether latent or patent. There was a patent ambiguity in the deed which this testimony was offered to explain, viz., that the "parts of lots 22 and 23, containing 172 acres, more or less," mentioned in the deed, were the same land advertised by the administrator, and claimed by the plaintiff in error.

It is true that the plaintiff in error went no further with his case in the court below; but it was not necessary; nor could he go further. He claimed through Nancy Carter; and when the deed to Nancy Carter was rejected by the court, his evidence of title was destroyed. We reverse the judgment of the court below, on the ground that the court erred in rejecting this deed and the parol evidence offered to explain the same.

Judgment reversed.

SUFFICIENCY OF DESCRIPTION OF LANDS IN DEED, and when deed is void by reason of uncertainty in such description: *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679, and cases in note 681.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN all latent ambiguities in deeds, and the evidence required for that purpose need not be of the same high character as would be required to authorize the correction of a mistake therein: *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252, and cases collected in note 256. The evidence must be clear, positive, and convincing in order to so reform a deed as to include therein land claimed to have been omitted by mistake: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and note 325. Parol evidence that a limitation as to the use of land entered into the consideration of a deed thereof is admissible, although the deed may be silent as to it: *Sutton v. Head*, 86 Ky. 156; 9 Am. St. Rep. 274.

PAROL EVIDENCE IS NOT ADMISSIBLE to prove a warranty of the quantity of land conveyed by deed: *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313; compare *Sullivan v. Lear*, 23 Fla. 463; 11 Am. St. Rep. 388, and note; *Cornwall etc. R. R. Co.'s Appeal*, 125 Pa. St. 232; 11 Am. St. Rep. 889, and note; *Real Estate etc. Co.'s Appeal*, 125 Pa. St. 549; 11 Am. St. Rep. 920, and note.

ALMAND v. SCOTT.

[80 GEORGIA, 95.]

LANDLORD AND TENANT — PRIORITY OF JUDGMENT LIEN ON RENTER'S CROP.

— Where the landlord furnishes the land and supplies to make the crop, and keeps a general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for his work, the laborer is a cropper, and judgments or liens cannot subject his part of the crop until the landlord is fully paid. But where there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a parol contract with the tenant by which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid off. The landlord may protect himself in such case through the lien which the law gives him for supplies.

A. C. McCalla, for the plaintiffs in error.

J. N. Glenn and J. R. Irwin, contra.

SIMMONS, J. It appears from the record that in the year 1885 N. M. Almand rented to J. E. Plunkett a certain tract of land; that Plunkett was to pay for the rent thereof a third of the cotton and a fourth of the corn raised on the land, and that the entire crop was to be the property of J. H. and N. M. Almand until the debt created for supplies furnished to Plunkett to make the crop on the land rented was entirely paid off. A certain bale of cotton raised on the land by Plunkett was carried by him to the warehouse. Before it was weighed, it was seized by a constable by virtue of a *fieri facias* in favor of George W. Scott & Co. against J. E. Plunkett, as the property of Plunkett. Scott's judgment against Plunkett was obtained on the 20th of December, 1884, and the renting of the

land by Plunkett was in 1885, and the levy on the cotton was made on the 6th of November, 1885. Almand filed a claim to the cotton. At the trial of the claim case in the superior court, Plunkett testified, in favor of the claimant, that he had made a verbal contract with the claimant, by which he was to cultivate the land of the claimant and pay him the third of the cotton and the fourth of the corn crop raised on the land, and that the entire crop raised was to be and remain the property of the claimant for supplies to be furnished by him to make the crop. The claimants furnished the supplies, and the witness, as their tenant, delivered the bale of cotton levied on to go on the debt for supplies; it did not fully pay off the debt; the cotton was raised on the rented land. The claimant testified in his own behalf, and stated that he rented the land to Plunkett, and that Plunkett was to pay a third and a fourth of the crop raised on the land as rent, and the entire crop raised was to be the property of the claimant until the supply debt furnished to Plunkett to make the crop on the land rented was entirely paid off. The jury, under the charge of the court, found the property subject. A motion for a new trial was made, and was overruled by the court, and the claimant excepted.

The third ground of the motion was the principal one insisted upon before us for reversal of the case. It was, that the court erred in charging the jury: "If you find that J. E. Plunkett raised the cotton in controversy, and had it in his possession after the rendition of the judgment from which the *fieri facias* issued, and you find that he was the tenant of claimants during the year in which the cotton was raised on the land on which it was raised, as tenant under a contract of rent, by which he agreed to pay an agreed part of the crop for rent, then you would be authorized to find the property subject; and if you should find that it was agreed, at the time of the renting, that all the crop should remain on the land as claimant's property, this would not authorize you to find the property not subject."

It was insisted by the counsel for the plaintiffs in error that this property was not subject to the *fieri facias* of Scott, because, at the time of the renting of the land by Almand to Plunkett, a verbal contract was made whereby Plunkett agreed that the whole crop should be Almand's until the debt which he owed Almand for supplies to make the crop had been fully paid off and discharged, although Scott's judgment

was older than the contract made between Almand and Plunkett. We do not agree with him in this contention. The evidence clearly shows that the relation of landlord and tenant existed between Almand and Plunkett. They both swore that Plunkett rented the land from Almand for a specified rent. The land, therefore, was in possession of Plunkett, the tenant, and not in Almand, the owner. The work was not done under Almand's superintendence and direction. Almand had no control over the land, and the crop made on the land was not to go in payment to Plunkett for his labor in making the crop. It was a contract for rent, and not a bargain to crop. He was, therefore, not a cropper, as defined in *Appling v. Odom*, 46 Ga. 583, and in *Sims v. Dorsey*, 61 Id. 488, but was a tenant. The rule seems to be, that where the landlord furnishes the land and supplies, and other things of that sort, and keeps general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for his work, the laborer is then a cropper, and judgments or liens cannot sell his part of the crop until the landlord is fully paid; but where there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a contract with the tenant in which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid off. If the landlord wishes to protect himself, the law gives him a lien for supplies in preference to the older judgments and liens, and he must take this lien and foreclose it in order to protect himself. A verbal contract with his tenant that the crop shall belong to him until his debt for supplies is paid will not protect him against older liens or judgments: *Wadley v. Williams*, 75 Ga. 272; *Taylor on Landlord and Tenant*, sec. 474. We therefore think there was no error, under the facts disclosed by this record, in the charge of the court complained of, and that the verdict is amply sustained by the evidence.

Judgment affirmed.

LANDLORD AND TENANT — LIEN FOR RENT RESERVED IN LEASE. — A lease of a hotel in process of erection stipulated that all furniture and fixtures should be bound for the rent, which was payable monthly, and the lease was to take effect at a future day. When signed, the hotel was unfurnished, but before it took effect there were furniture and fixtures in the hotel. In such case, a lien attached upon the furniture and fixtures for the full amount of the rent reserved, and had priority over a mortgage given after the lease took effect, but before rent was in arrears, to one knowing of the stipulation:

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Wright v. Bircher, 72 Mo. 179; 37 Am. Rep. 433; and see *First Nat. Bank v. Turnbull*, 32 Gratt. 695; 34 Am. Rep. 791.

LANDLORD AND TENANT. — A purchaser from a tenant of crops subject to the lien for rents is liable to an assignee of a rent note for any amount due on such note, not exceeding the value of the crops purchased: *Biggs v. Piper*, 86 Tenn. 589. So a purchaser from a tenant of crops subject to a landlord's lien for rent is liable to such landlord for the unpaid rents to the extent of the value of the crops purchased, although such purchaser had no notice of the lien: *Davis v. Wilson*, 86 Id. 519. That a landlord's lien may be superior to other liens, he must assert it within ninety days after it becomes due, under the laws of Kentucky: *Gedge v. Shoenberger*, 83 Ky. 91; compare *Bridgers v. Dill*, 97 N. C. 222; *Bolton v. Lambert*, 72 Iowa, 483.

ATLANTA COTTON-SEED OIL MILLS v. COFFEY.

[80 GEORGIA, 145.]

NEGLIGENCE — LIABILITY OF OWNER OR OCCUPIER OF PREMISES TO PERSONS THEREON BY INVITATION. — When the owner or occupier of land, expressly or by implication, invites others to come upon his premises for any lawful purpose, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit, and he is liable in damages to persons, so invited, for injuries sustained by reason of the unsafe condition of the land or its approaches.

NEGLIGENCE — DANGEROUS PREMISES. — KEEPING AND USING DANGEROUS CHEMICAL ON ONE'S PREMISES, and knowing it to be dangerous, is analogous to having a dangerous animal confined on the premises; and if such chemical escapes and mingles with the soil, whereby a person lawfully upon the premises by invitation, express or implied, is injured, the burden rests upon the proprietor to show that he exercised ordinary care to prevent the chemical from escaping.

NEGLIGENCE — DANGEROUS PREMISES — FACTS FROM WHICH NEGLIGENCE MAY BE INFERRED. — In an action to recover damages for the loss of the plaintiff's horse, caused by the alleged negligence of the defendant, it was shown that the horse stepped into a mud-hole within a few feet of the defendant's cotton-seed oil mills, on a private way over the defendant's land, where the plaintiff lawfully was; that immediately afterward the horse showed signs of pain, and upon examination something like a scald or burn was discovered above the hoofs of two of his feet; it was further shown that caustic soda was used in the mill for refining oil, and that when dissolved in water it would burn animal flesh. The horse's hoofs and ankles were severely burned, from the effects of which he died. There was no evidence tending to show how the caustic soda escaped from the mill-house into the mud. In such case, the jury were authorized to infer negligence on the part of the defendant in allowing the dangerous substance to get from the mill to where it was.

PLEADING AND PRACTICE. — WHERE DECLARATION HAS BEEN AMENDED, IT IS NOT ERROR TO DENY MOTION to continue the case on the ground of surprise, when the defendant's counsel does not state that "he was less prepared for trial than he would have been if such amendment had not been made, and how, and that such surprise was not claimed for the purpose of delay," — as provided by Georgia Code, section 3521.

DAMAGES. — WHERE PERSONAL PROPERTY IS INJURED BUT NOT DESTROYED, loss of hire may be recovered as damages. But where the property is lost or destroyed by the negligent act of another, the measure of damages is the full market value of the property at the time of the loss, and interest thereon.

Steward and Harper, L. W. Thomas, and J. H. Lumpkin, for the plaintiff in error.

H. C. Jones, and Alexander and Turnbull, contra.

SIMMONS, J. Coffey brought his suit against the Atlanta Cotton-seed Oil Mills for damages. The jury found in favor of the plaintiff, and a motion was made for a new trial, and was overruled by the court; and the defendant excepted, and assigns as error the overruling of this motion.

It appears, from the record in this case, that the defendant in the court below had given to the Orphans' Home a quantity of cotton-seed hulls, to be used as a fertilizer. The manager of the Orphans' Home employed Coffey to haul the hulls from the mill to the farm belonging to the Orphans' Home. It appears also that the defendant had sold at divers times to other persons quantities of these hulls, and that they had hauled them away from the mill. Coffey applied to the superintendent for permission to remove the hulls, and the permission was granted. There was a private way from the public road over the land of the defendant by which Coffey and others approached the mill. In a few feet from the mill-house there was a ditch over which there was a small bridge. Near this bridge, and between it and the mill, was a mud-hole. Coffey's team had made one trip on the morning on which it was alleged his horse was injured. In making the second trip, the horse stepped into the mud and immediately showed signs of pain. He was unhitched from the wagon and carried to a blacksmith, who examined his feet and discovered above the hoofs of two of his feet something like a scald or burn. On washing the feet, the water when applied produced something like the lather of soap. The record further discloses that, for the purpose of refining the oil, caustic soda was used; and the testimony showed that caustic soda, when dissolved in water, would burn animal flesh. There was no evidence going to show how the caustic soda got out of the mill-house into the mud; but there is no doubt, from the evidence in the case, that the horse's hoofs and ankles were severely burned by this caustic soda, and that

he died from the effect of the burns. This, in substance, was the evidence upon the trial of the case.

1. We think that there was sufficient evidence to authorize the finding of the jury, taking into consideration the fact that the horse was injured within a few feet of the mill, that caustic soda was used in the mill and would burn animal flesh, and the further fact that the defendant did not account nor attempt to account for its presence in the water or mud near its mill. The jury were authorized to infer negligence on the part of the defendant in allowing the dangerous substance to get from the mill to where it was.

2. It was insisted in the argument of the case before us that, while it may have been true that the horse was injured in the manner complained of in the declaration, yet the defendant was not liable, because Coffey was a mere licensee, and that the defendant owed him no duty to protect him or to warn him against this dangerous substance. We do not agree with the plaintiff in error in this view of the case. We do not think that Coffey was a mere licensee. The rule of law is, that "when the owner or occupier of land, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches." Judge Cooley, in his work on torts, page 605, says that when one, "expressly or by implication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

In this case, the evidence discloses the fact that it was a custom of this mill to sell these hulls, but in this particular instance the hulls were given to the manager of the Orphans' Home, and he was invited to haul them away, and sent Coffey to perform the work. It was therefore incumbent on the defendant, according to the rule above stated, to see that the approach to the mill was reasonably safe for the persons whom he had invited to come thereto. He knew the danger of the substance that he used in and about his mill, and it was his duty to be careful to see that none of it escaped so as to injure the persons whom he had invited.

This case does not depend so much upon the doctrine of keeping roads in repair and reasonably safe as it does upon

another principle of law. As said before, this was a dangerous chemical used in and about this mill. The danger of it was known to the proprietors. It was the same as if they had had some dangerous animal confined on their premises. If they had had such a dangerous animal, and it had escaped and injured persons whom they had invited to the mill, they certainly would have been liable, unless they had shown that they had exercised reasonable care in keeping the animal. If they could show this, of course they would not be liable. Analogizing the dangerous chemical to a dangerous animal, they ought to have shown that they exercised ordinary care to prevent this dangerous chemical from getting from the house into the mud, and becoming dissolved with it. It appears from the record, as said before, that they did not show or attempt to account for the way the chemical got from the house into the mud. It is true, the superintendent and the president testified to the ordinary way of sweeping it up and putting it into the retort after it was broken into fragments, but no servants or employees were introduced as witnesses to testify as to whether it came from the house or not, and if it did, in what manner it got from the house, whether by their negligence or the acts of others not connected with the mill. We think, therefore, that the court was right in giving the charges complained of in the motion for a new trial.

4. There was no error in overruling the demurrer in the case; and there was no error in refusing the nonsuit. Nor was there any error in refusing to continue the case when the amendment to the plaintiff's declaration was made, on the ground of surprise, the defendant's counsel not stating that "he was less prepared for trial than he would have been if such amendment had not been made, and how, and that such surprise was not claimed for the purpose of delay": Code, sec. 3521.

5. The ninth ground of the motion is, because the court erred in charging the jury as follows: "Whatever the horse would have made for hire during that time (from the time of the injury to his death), he would be entitled to recover." We think the exception to this charge is well taken. The rule as laid down by the court in this charge would have been the proper rule in case the horse had been injured and not killed; but where the personal property is lost or destroyed by the negligent acts of another, the rule of damages is different. In the latter case he is entitled to recover the full value of the

property lost or destroyed, according to the market rates current at the time of the loss, and interest on the same. He is also entitled to recover the expense of keeping the horse, medical attendance, medicines, and things of that sort; but he is not entitled to recover the hire during the sickness of the horse in case the horse dies. The full value of the horse and interest at the time of the injury or loss is the compensation the law allows him: *Shearman and Redfield on Negligence*, sec. 603, and notes. As to the rule of damages where the property is injured but not destroyed, see *Atlanta etc. R. R. Co. v. Hudson*, 62 Ga. 679. In this case, the evidence shows that the hire of the horse for one month, the time he was sick, was worth \$22.50. It is ordered that the plaintiff write off this amount from his verdict, and the judgment of the court below stand affirmed.

Judgment affirmed, with direction.

NEGLIGENCE. — OWNER OF PREMISES WHO INVITES PERSONS UPON THEM assumes an obligation that they are in safe condition. But damages are not recoverable by a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the premises of another, unless the contrivance is such as the owner may not lawfully erect or use, or where the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises: *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and cases collected in note 615; compare *Armstrong v. Medbury*, 67 Mich. 250; 11 Am. St. Rep. 585, and note.

DAMAGES — MEASURE OF, FOR DESTRUCTION OR LOSS OF GROWING CROP. *Byrne v. Minneapolis etc. R. R. Co.*, 38 Minn. 212; 8 Am. St. Rep. 668, and note 671.

LOSS OF PROFITS NOT RECOVERABLE AS DAMAGES, where machine is injured by carrier's negligence: *Thomas etc. Mfg. Co. v. Railway Co.*, 62 Wis. 642; 51 Am. Rep. 725; see *McKinnon v. McEwan*, 48 Mich. 106; 42 Am. Rep. 458; *Jones v. George*, 66 Tex. 149; 42 Am. Rep. 689.

DAMAGES FOR LOSS OR DESTRUCTION OF PROPERTY — RECENT CASES. — Where a nuisance has been maintained upon land, the measure of damages is the impairment of the value of such land for practical purposes caused by such nuisance during its continuance, and, in such a case, the difference in market value of the land cannot be taken into consideration: *Harmon v. Railroad Co.*, 87 Tenn. 614; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 313. Ordinarily, the actual damages sustained by being deprived of the use and occupation of one's land is the value of the use and occupation of such land during the time he is deprived of the possession thereof: *Eva v. McMahon*, 77 Cal. 467. Where a railroad has been located over one's land, the proper elements of damages are whatever tends to make the land of less value after the location than it was before: *Board of Commissioners v. Hogan*, 39 Kan. 606. The measure of damages for an injury to a brood mare, caused by defendant's negligence, resulting in her death, is such mare's value at the time of the injury: *Gamble v. Mullin*, 74 Iowa, 99; *Gardner v. Burlington etc. R. R. Co.*, 68 Id. 592.

SALTER v. SALTER.

[80 GEORGIA, 178.]

EQUITY. — COURT OF EQUITY ALONE HAS JURISDICTION OF SUBJECT-MATTER OF BILL FILED BY WIFE to set up her equity in property coming to her from her father's estate, and which has not been reduced to possession by her.

PARENT AND CHILD. — WHEN BILL IN EQUITY IS FILED BY WIFE TO SET UP HER EQUITY IN PROPERTY, the rights of her children attach immediately, and the court will make a provision for them, except where the wife dissents or objects thereto. It is not necessary that the children should be made parties to the bill.

HUSBAND AND WIFE. — HUSBAND IS NECESSARY PARTY TO BILL FILED BY WIFE setting up her equity in her father's estate before it had been reduced to possession. The bill being filed to prevent his marital rights from attaching, unless he was made a party, the decree could not affect him. But creditors who were parties to the bill would be bound by the decree, although the husband was not made a party.

INFANCY — GUARDIAN AS PARTY — INFANT NOT BOUND BY DECREE. — A decree rendered in a suit in equity, affecting the rights of an infant, whose guardian was a party to the bill individually but not as guardian, does not bind the infant.

TRUSTS — ACTS AMOUNTING TO ACCEPTANCE OF TRUST. — Where one, as next friend of a married woman, files a bill to set up her equity in her father's estate, and to prevent the marital rights of her husband from attaching thereto, and was decreed by the court to be a trustee, with the title vested in him as trustee for the wife and children, this amounts to an acceptance of the trust by him; and if there was no renunciation of the trust, he would continue to be trustee for the children, and failing to act when he should do so he would be liable to them for his non-action.

STATUTE OF LIMITATIONS — ACTION BY TRUSTEE BARRED. — By decree of court the title to certain property was vested in a trustee for a wife and her children, and they went into possession of the property, and remained in possession of it for a sufficient length of time to acquire title by prescription, after which the property was sold under an execution, and the purchaser at the execution sale remained in possession longer than the statutory period. In such case an action by the trustee for possession would be barred, and the children would likewise be barred if nothing else appeared.

FRAUD WHICH WILL PREVENT POSSESSION OF PROPERTY FROM BEING FOUNDATION OF PRESCRIPTION must be positive or actual fraud, and not constructive or legal fraud, and the jury must determine whether or not there was positive fraud.

BILL in equity filed by B. A. Salter, as next friend of certain minors, children of Mary E. Salter, to establish the claims of said minors to certain property, purchased by the defendants, John F. Salter and others, at an execution sale of the property under a judgment obtained against John F. Salter, one of the defendants, and husband of Mary E. Salter. It appeared

that several years prior to said execution sale, Mary E. Salter, the mother of said minors, filed her bill by her next friend, setting up her equity in the property now claimed, and that a decree was rendered vesting the title thereto in the next friend as trustee for her and her children. Other facts appearing in the opinion fully present the case.

Harris and Anderson, J. S. Hook, and Clifford Anderson, for the plaintiff.

Evans and Evans, J. A. Robson, and H. D. D. Twiggs, for the defendants.

BLANDFORD, J. The defendants demurred to the bill in this case upon the ground that there was no equity in the bill; that the complainants had a full and adequate remedy at law, and that, as appeared from the bill, they were barred by the statute of limitations. The court sustained the demurrer, and dismissed the bill; and this is excepted to and error assigned thereon.

1. There are several questions which arise out of this record. The first question made is, that the court had no jurisdiction of the subject-matter of the bill. The subject-matter of the bill filed by the wife was to set up her equity to this property coming to her from her father's estate before it had been reduced to possession by her.

While it was formerly a matter of much doubt, yet it is now well settled that a court of equity, and no other court, has jurisdiction of this subject-matter. It is peculiarly a matter of equity jurisdiction. This is well stated by Mr. Story, in 2 Story's Eq. Jur., sec. 1414. We think, therefore, as to the subject-matter of the bill, that the superior court of Washington County had jurisdiction.

2. The next question is, that there was no jurisdiction in the court to provide for the children of Mary Eliza Salter, they not being parties to this bill. There was no necessity for the children to be made parties to the bill. As soon as the bill is filed by the wife to set up her equity, the rights of the children attach immediately; and the court will make a provision for them, except where the wife dissents or objects thereto. She may defeat any provision for the children by objecting, and if she makes no objection, the court decrees a provision not only for her, but a provision for the children, upon the assumption that she consents thereto. This doctrine is recognized in 2

Story's Eq. Jur., sec. 1417; and numerous authorities are cited under that section to sustain the proposition.

3. The next proposition is, that the husband, not being a party to the bill, the court could not set up the wife's equity. We think the husband was a necessary party to this bill to come into court and make a provision for his wife, or a settlement on her; and if it was a proper settlement, the court would refuse to set up her equity, and would take the settlement. This is a well-recognized principle in equity. He is to be affected by the bill, and is a necessary party; the bill was filed to prevent his marital rights from attaching; and unless he was a party to the bill, that decree could not affect him.

4. The next question is, Are the creditors who were made parties to this bill bound by the decree if the husband was not made a party to the bill? We think they were. They were parties to the bill, and were bound by that decree just so long as it remained unreversed, and not set aside in the proper way. All who were parties to the bill were bound by the decree. That is why they are made parties, — to bind them.

5. The next question is, as to whether this decree would bind the creditor whose guardian was a party to the bill individually, but not as a guardian for the infant creditor, such infant not being a party. We are of the opinion that the infant creditor of John F. Salter, the husband (Nathan J. Botts, whose guardian, Bennett Wamble, was a party individually to this bill because he was also a creditor of J. F. Salter, the husband), is not bound by this decree. The guardian was not made a party as guardian. The infant was not made a party to the bill. Under the allegations in this bill, this guardian represented the infant as to the latter's rights against a former guardian; and judgment was obtained for five thousand dollars afterwards on account of the *devastavit* committed by J. F. Salter, the husband, for this infant. We think this infant is not bound by the decree, and therefore that the judgment in favor of the infant against J. F. Salter is in no way affected by the decree.

6. It is insisted by the plaintiff in error that William G. Salter, who, as the next friend of Mrs. Salter, preferred this bill to set up her equity, and was decreed by the court to be a trustee, with the title vested in him as trustee for the wife and her children, never accepted this trust, and never did any act afterwards showing that he had accepted it. But it is no-

where alleged that he ever renounced the trust. The question is now, Did he accept this trust under the facts alleged in this bill? We are of the opinion that he did. He procured this decree to be made. It was made at his instance; and we think that that fact makes him a trustee; that was an acceptance of the trust by him. And if there was no renunciation of the trust by him, he still continued as trustee for these children; and if he failed to act when he ought to have acted, he is liable to the children for his non-action.

7. So the question arises here, Were these children barred when they brought this suit against these purchasers at the sale under the execution in favor of Wamble, the guardian of Nathan J. Botts, the minor? Whether these purchasers got a good title or not under the facts I have stated, and whether they remained in possession of the land, as shown at the time they filed this bill, they remained on it over the statutory period. They remained in possession some ten or eleven years. And if this trustee could have sued and recovered this land, the legal title being in him, and failed to sue, he would have been barred from bringing any other action to recover after the lapse of the statutory period. He could not sue and regain the land if he let the statute bar it. And if he could have sued and recovered it,—had he brought his action within the proper time,—we think the children would have been barred of any right themselves to bring their action. But in this case something else appears.

It appears that before this decree was rendered in 1869, setting up the wife's equity, John F. Salter, the husband, in 1868, appeared at the time this land was divided in kind, and drew his wife's share of the land for her next friend, William G. Salter; and it was so returned to the court of ordinary.

It is further alleged in the bill that this property came from her father's estate; that she had never had possession of it, and neither had her husband; that he recognized this property to be hers as her separate property; and afterwards, while he was not a party to this bill, the decree was rendered making a provision for the wife, and settling upon a trustee for her and her children this property, he consenting thereto, being present and making no objection. He could have made this settlement himself on his wife. He had a right to do it. A court of equity will set up a post-nuptial settlement made by the husband upon the wife against creditors.

This decree was rendered, putting the title in the trustee

for the wife and children. They went into possession of the property under this decree, which we hold to be good color of title; and remained in possession of it for more than seven years before the sale under the execution obtained by Wamble, as guardian of Botts, was ever levied upon this land. They therefore had the title to this land. This was a complete title in them,—a title by prescription. They claimed it as their own. The husband recognized it as the separate estate of the wife all the time. And this trustee, if he had brought his action within seven years after this sale occurred against these purchasers, could, under these facts, have unquestionably, in our opinion, recovered possession of the land.

8. There is but one other question to be disposed of. He having failed to bring his action, is barred; and if he is barred, the children are barred. But the bill alleges that these purchasers knew all about this title in the complainants at the time they made the purchase. The code says that possession of property, to be the foundation of prescription, must not have originated in fraud. If they knew that this title was not in the defendant in execution, John F. Salter, and that the land was not subject to the execution, but that the title was really in the children, that, in our opinion, would amount to such a fraud as is contemplated by the code. We think that the fraud mentioned there means positive fraud,—actual fraud, not constructive or legal fraud. It must be such a fraud as affects the conscience. If they had reason to believe, and did believe, that the property was subject to the execution, although they might have known of the claim set up by the complainants in this bill, then that, in our opinion, would not amount to positive fraud. It would be merely a constructive fraud.

But this is a question for the jury to determine, under the facts of this case. The jury must determine for themselves whether this was such a fraud as we have stated, i. e., a positive fraud. If they knew that the title was not in the father, but was in the children, and was not subject to the judgment against the father for the debt of the latter, and the jury could say, from all the facts and circumstances, whether it was a positive fraud, such a fraud as affected their consciences, then they could take nothing by this prescription; and the jury would be authorized to find for the complainant this property sued for in the bill. We think, therefore, under these facts as stated, that here was a question for the jury; and the court

ought not to have sustained this demurrer and dismissed the bill.

But we find one difficulty here. This trustee is not a party in this case. They proceeded upon the assumption that he had never accepted the trust; that he had never done any act as trustee, and therefore was not trustee. We think that he was. We think, though, and so direct, that this bill should be amended so as to make the trustee a party complainant thereto; and that the case should go back and be tried on the question as to whether these purchasers, at the time they made the purchase, were, on account of their knowledge, and in view of all the facts and circumstances connected with the transaction, guilty of such a fraud as stated. All this should be left to the jury to determine. So we reverse the decree of the court below dismissing this bill, with the direction stated, viz., that this trustee be made a party.

Judgment reversed.

EQUITY — HOW MARRIED WOMAN IS REGARDED IN EQUITY in respect to her separate estate: *Botts v. Gooch*, 97 Mo. 88; 10 Am. St. Rep. 288, and note 288; *Kirkpatrick v. Buford*, 21 Ark. 268; 76 Am. Dec. 363, and see note 367-401, showing how the separate property of a married woman is affected by American statutes.

WIFE CANNOT DEMAND SETTLEMENT IN EQUITY of her interest in her father's estate, to which the husband had an immediate right of possession, if she was present and made no objection to her husband's sale of it. Such conduct repels her equity against the purchaser: *Wright v. Arnold*, 14 B. Mon. 638; 61 Am. Dec. 172; *Marshall v. Marshall*, 86 Ala. 383; *Onerspeck v. Thoman*, 92 Mo. 475.

GUARDIAN AND WARD — COURT WILL NOT SUFFER WARD TO BE PREJUDICED either by the admissions or laches of the guardian: *Long v. Mulford*, 17 Ohio St. 484; 93 Am. Dec. 638, and note 652.

TRUSTS AND TRUSTEES — RIGHTS OF INFANT, TITLE TO WHOSE PROPERTY IS IN TRUSTEE, guardian, or executor, how affected by statute of limitations: *Moore v. Armstrong*, 10 Ohio, 41; 36 Am. Dec. 63, and note 68; *Grimsley v. Hudnell*, 76 Ga. 378; 2 Am. St. Rep. 46.

TRUST WILL NOT BE PERMITTED TO FAIL through failure or disability of the trustee to execute the trust: *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495. Refusal of trustee in trust deed to act, effect of: *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638.

UNTIL TRUST IS REPUDIATED, CESTUI QUE TRUST HAS RIGHT TO RELY upon the integrity and faithfulness of his trustee, without forfeiting his rights: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and see note 530.

LAPSE OF TIME IN EQUITY IS NO BAR TO RELIEF, when such relief is prevented by fraud until after the discovery of the fraud: *Townsend v. Townsend*, 4 Cold. 70; 94 Am. Dec. 185. To prove actual fraud, the evidence must be strong and decisive: *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; and see *Waddingham v. Loker*, 44 Mo. 132; 100 Am. Dec. 260.

GILBERT v. CRYSTAL FOUNTAIN LODGE, ETC

[80 GEORGIA, 284.]

LIBEL AND SLANDER. — THERE APPEARS TO BE NO AUTHORITY supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member.

LIBEL AND SLANDER. — MEMBER OF MUTUAL AID ASSOCIATION CANNOT MAINTAIN AN ACTION against the association, sued as a partnership, for slanderous words spoken of and concerning him by the association while a member of it, and his remedy, if any, is against the wrong-doers individually. And it is immaterial in this respect that, in consequence of the slander, he was suspended from the benefits and privileges of the association for a term of years, and brought suit pending such term of suspension.

George T. Fry, and Broyles and Johnston, for the plaintiff.

Hoke Smith, and J. R. Whiteside, for the defendants.

BLECKLEY, C. J. The plaintiff, a minister of the gospel (and as we construe his declaration, a most worthy and upright man), brought his complaint for words against a mutual aid association of which he was a member, alleging the uttering by that association, as a partnership (the suit being against it as a partnership), of certain words imputing to him, as he alleges, the offense of obtaining money by false pretenses from the association, — cheating and swindling, — and certain other words importing that he was afflicted with a loathsome and contagious venereal disease. He alleges that in consequence of the use of these words he was suspended from the benefits and privileges of the association for five years; and he lays general damages in a large sum for his grievances. The declaration was demurred to, the demurrer was sustained, and the action was dismissed. We are now to determine, upon this writ of error, whether there is a cause of action set forth in the declaration.

If, as the declaration alleges, the association was a partnership, the plaintiff was a member of it; and after diligent search, we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle, we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as part owner of the same. Nor can we see how he can escape the general rule that, in an

action at law against a partnership, all the partners, so far as the partnership assets are involved, must be defendants. That rule, applied to this case, would require the plaintiff to sue himself. The equity powers of the court cannot be invoked to overcome this obstacle, for a court of equity has not, nor ever had, jurisdiction to decree damages for defamation or slander.

Turning from the remedy to the wrong itself, there is much doubt whether the facts alleged make out the imputation of a crime or misdemeanor. In *Beckett v. Sterrett*, 4 Blackf. 499, an action for slander brought by one partner against another, who had charged the plaintiff with pilfering money out of the partnership store, was maintained; the court holding that there were various ways in which money other than partnership money could be stolen out of the store; and it must be intended (the court said) that the words import the stealing of something as to which the plaintiff could be a thief. There is an implication in this that a partner could not be a thief in respect to the partnership assets; and here it was the association or partnership funds that the plaintiff was charged with procuring by misrepresenting the state of his health. The words imported that he had feigned sickness, and drawn relief from the association upon a false pretext. Had he done so, he would have gotten assets which belonged to himself jointly with the other members of the partnership, and it is at least doubtful whether getting them, though in so disreputable a way, would amount to an offense punishable by law. But the case as a whole cannot be ruled upon this distinction, because the venereal disease was not a partnership malady. That was individual property.

Whether a partnership can slander anybody might formerly have admitted of some question; for it is an old rule, going back to Croke's Reports, — perhaps further still, — that there could be no joint action against several persons for oral words. The courts considered that if two uttered the same words simultaneously, the vocal act of each would have a separate identity, and be an individual act; and so actions for such torts ought to be several and not joint. It seems there was finally a sort of judicial acquiescence in the theory that a slanderous song, chanted in concert by a number of voices, would lay the foundation for a joint action against all the musicians; and this appears to be as far as decisions have gone, save where the "New Orders" could be cited. That defamatory music is not mere melody but may be treated as harmony, is perhaps

good law. On principle, we can think of no reason why a partnership might not slander a third person through agents or members, authorized and empowered to defame orally; or by adoption and ratification, after defamation by slanderous words. The difficulty in the present case is, not alone that the partnership could not slander anybody, but that it could not slander a member of the firm, he being so united to the partnership that there could be no partnership tort that would not involve him as a tort-feasor; and he could not be both agent and patient in the infliction of an injury. Cases of defamation growing out of jars and bickerings amongst the members of associations, religious as well as secular, are, unfortunately, too numerous. Many of them are summarized and discussed in *Shurtliff v. Stevens*, 51 Vt. 501, itself a case of much interest, and quite instructive on the literature of the subject. Such actions are not to be encouraged, but rather discouraged, and we are not sorry to mete out strict law against them.

The declaration enables us to fix with certainty that the grievances complained of were committed before there was any suspension. So that even if suspension be in effect expulsion, the plaintiff was not suspended at the time the alleged tort was perpetrated.

Judgment affirmed.

PARTNERSHIP. — GENERAL RULE IS, ONE PARTNER CANNOT MAINTAIN ACTION AGAINST HIS COPARTNER until after a settlement of all partnership business: *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503, and cases collected in note 509.

MEMBERS OF VOLUNTARY ASSOCIATIONS ARE INDIVIDUALLY LIABLE, though not holding themselves out as partners: *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40, and note 42.

NO ACTION LIES AGAINST TRUSTEES OF RELIGIOUS SOCIETY for expulsion from the church organization connected with it: *Hardin v. Trustees etc.*, 51 Mich. 137; 47 Am. Rep. 555. See *Landis v. Campbell*, 79 Mo. 433; 49 Am. Rep. 239; *Sale v. Baptist Church*, 62 Iowa, 26; 49 Am. Rep. 136; *Nix v. Caldwell*, 81 Ky. 293; 50 Am. Rep. 163.

LIBEL AND SLANDER — CORPORATION IS LIABLE TO ACTION FOR LIBEL: *Evening Journal Ass'n v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; *Johnson v. Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84.

WILKERSON v. CLARK.

[80 GEORGIA, 267.]

SHELLEY'S CASE. — GEORGIA CODE OF 1862, SECTIONS 2248-2250, UTTERLY ABROGATES the rule in Shelley's case, as a rule of law in limitations over, as to conveyances executed since the code went into effect.

WILLS — APPLICATION OF RULE IN SHELLEY'S CASE. — A devise by a father, made and probated prior to the adoption of the Georgia Code of 1862, by which he gave to his married daughter an equal share with others of his children in his estate, adding, "to her benefit during her life, but my will is that (her husband) have no control of her distributive share, but that it be and remain the property of the heirs of her body after her death," passed an estate in fee-simple to the daughter in the lands allotted to her in the distribution of the estate, and her children took no interest by way of remainder, the words "heirs of her body," without qualifying or explanatory terms, being, before the adoption of the code, words of limitation, and not words of purchase.

ACTION of ejectment brought by the plaintiffs, Wilkerson and others, against the defendant Clark. The will of Nathan Vincent was executed and admitted to probate in 1841, and the land in dispute passed under the will to Syrena Wilkerson, the mother of the plaintiffs. She sold the land some time prior to her death in 1884 or 1885, and the defendant and those under whom he holds have been continuously in possession since that time, holding under her vendee. Judgment was rendered for the plaintiffs, but, upon motion for a new trial, it was set aside, and the plaintiffs excepted.

J. F. Redding, and Hall and Hammond, for the plaintiffs.

J. A. Hunt, for the defendant.

BLECKLEY, C. J. This devise, made in 1841, was by a father to his married daughter. He gave to her an equal share with each of his other children in the general residue of his estate, and added, "to her benefit during her natural life, but my will is that [her husband] have no control of her distributive share, but that it be and remain the property of the heirs of her body after her death." That by this provision of the will an estate of freehold was conveyed to the daughter, with the ultimate estate of inheritance to the heirs of her body, there is no dispute. Thus far both sides are agreed; and reduced to its final analysis the sole question between them is, whether the rule in Shelley's case applies, the effect of its application being to raise an estate which would in England be an estate-tail, but which in Georgia, by virtue of the statute (Cobb's Dig. 169), is an estate in fee-simple. There could hardly be a more apt

instance for the application of the rule. The very things are done which the rule contemplates, namely, an estate of freehold is given to a person, and by the same instrument the ultimate estate of inheritance is given to the heirs of the body of that same person. The appropriate technical words of entail are employed, and what the rule in Shelley's case undertakes to do is to determine the classification and effect of the same. According to the rule, they are to be treated as words of limitation, and not words of purchase.

The contention here is, that, though *eo nomine* the ultimate estate is given to the heirs of the body, it is not given to them as heirs, in the character of heirs, but as children, and these words, following words importing an estate for life in the daughter, are consequently words of purchase, not words of limitation. This is the very question which the rule solves and settles, unless there are explanatory words or clauses in the instrument which show affirmatively that the testator, though he expressed himself in legal language, did not use that language in a legal sense. Certainly, had he wanted to entail his property to the extent of this one share, he went about it in a right way, and did what would have accomplished his purpose save for the hindrance of our prohibitory law as to such estates. He made a disposition which, *prima facie* at least, has all the constituents of an estate-tail that he could supply, and which would be an estate-tail if the law would do its part, and vitalize it as such. This the law would not do, and for this reason alone no estate-tail was created. It takes two to create an estate, even by the *ex parte* instrumentality of a last will and testament; it takes the testator and the law. Here the testator completed the workmanship of an estate-tail on his part; but the law declining to co-operate, that particular kind of estate was not generated. It is said that, though he adapted his work so exactly to the creation of an estate-tail, he really had no such estate in contemplation, but meant that his words should be taken as words of purchase; words importing children of the first generation alone, and not also their children after them in indefinite succession to the end of time or failure of the blood. If he meant children in the literal and restricted sense, he could have said so with a single word, and one which was appropriate to his supposed purpose, both legally and colloquially. Still it is not impossible that he may have used a phrase of four words, — "heirs of her body," — as the precise equivalent of the one word

"children"; for, strange as it would seem, it is often done both in wills and deeds. That such was his purpose is said to be inferable, first, from the express exclusion of his daughter's husband, which, it is suggested, would have been needless had he intended an estate-tail, as the bare entailment would have been an exclusion of the husband from participating in the inheritance, supposing the entailment to be effective. But observe what is said of the husband is, that he "have no control of her distributive share," showing a design to create in the wife (testator's daughter) a separate estate, one free from the marital rights of her husband; and this object accounts fully for the presence of the clause respecting him. As our law stood at the date of this will, his marital rights, but for this or some such clause of exclusion, would or might have attached upon whatsoever estate his wife acquired. The will sought to exclude him, not only from the inheritance, but from control pending the coverture; both of which objects are quite as compatible with an estate-tail as with any other. Indeed, one of them, the former, is essential to an estate-tail, being involved in the very nature of the estate, and therefore needing no express mention in the instrument seeking to create it. But the latter did need express mention, as without it, whether the estate in the wife was one for life, in fee or in tail, the marital rights would or might have attached. It follows that these words respecting the husband are not rendered superfluous by adhering to the general signification, rather than adopting a special and restricted signification for the terms "heirs of the body," as used in this will.

Another circumstance relied on is, that other daughters of the testator shared equally with this one in the testator's estate by the provisions of the will, and that their shares were given absolutely, without remainder, and without exclusion of or restrictions upon their husbands. The argument is, that as the testator did not provide for keeping in the blood the shares of these other daughters, he had no such design respecting the share of this one. He certainly had no general testamentary scheme embracing the entailment of his property, nor did he have any embracing the exclusion of husbands, or of heirs general, yet, in this one instance, he certainly excluded the husband and heirs general of the daughter. Having deviated so far from the disposition made in behalf of other daughters, and having done so by using words appropriate to the generation of an estate-tail, why

should it be concluded that he did not intend such an estate for this daughter and her posterity from the fact that he provided otherwise for the other daughters? We think there is too much of guess-work in this reasoning to make it the basis of a legal judgment. Too doubtful and uncertain is the theory of counsel, however stated, that the only purpose the testator had in discriminating amongst the daughters was to hold off the husband of this particular daughter, and prevent the property from ever vesting in him. We do not know whether that was his only purpose or not, since there is nothing in the will, apart from what he has said in the devise we are construing, to inform us. But grant that such was his only purpose as an end, it would still leave the question whether his purpose, as means to accomplish it, was not to do what he has done, that is, attempt to create an estate-tail. That he could have excluded the husband without giving the devise the color and characteristics of an estate-tail, is certain. Then how can we conclude, except by mere guess, that he hit upon an apparent entailment by mistake rather than by design? The truth is, that any possible doubt about the matter grows out of the failure of the estate-tail to take effect as such. If the law would let the devise have effect as it is written, the title under it to a fee-tail would be impregnable. It would be upheld in any court in any country where the rule in Shelley's case is recognized and administered.

Lastly, it is urged that the testator, having given by the will two small pecuniary legacies, one to the "lawful heirs" of a brother, the other to a sister "if living, or her lawful heirs, if she be not alive," he certainly used "heirs" as synonymous with children in these bequests; whence it follows that he also used "heirs of the body" in a like sense. If he meant children by the terms "lawful heirs," as he possibly did, though that is not more but rather less certain than our main question, why he should have changed his vocabulary to "heirs of the body," if his meaning was unchanged, is not easily accounted for. If in his mind three sets of immediate children, and they only, were in contemplation, why did he call two of them "lawful heirs," and one of them "heirs of the body"? True enough, he might have done this; but did he do it? Do or can we know it well enough to escape from a rule of law so well settled as the rule in Shelley's case, and so directly in point?

We have gone over all the provisions of the will which were relied upon in the argument to supply qualifying or explanatory words for a reduced interpretation of the words of entail, and in none of them separately, nor in all together, can we discover the slightest reason for adopting the construction contended for. We have felt bound, in good faith, to try this will by the law as it existed prior to the adoption of the code; for that is the law applicable to it, and the new provisions of the code should have no influence on the decision. The code, by sections 2248, 2249, and 2250, abrogates the rule in Shelley's case,—wipes it out utterly as a rule of law in limitations over; but this is only as to conveyances executed since the code went into effect; that is, since the year 1862. Prior to 1863, the terms "heirs of the body," when used in conveyances, unless modified or controlled by qualifying or explanatory words, were words of limitation, not words of purchase. The code, by section 2250, leaves them still words of limitation, where no less estate than the fee is expressed, and where they are used, not by way of limitation over, but of direct and immediate limitation of the estate granted. When they take effect as words of limitation, they do so as they did prior to the adoption of the code, under the act of 1821, and pass, not a fee-tail, but a fee-simple. The limitation power of the terms "heirs of the body" is neither more nor less than that of "heirs," but just the same. Legally, they mean heirs general, both under the code and the act of 1821. The difference is, that, under the code, they are taken as words of limitation only in the one instance; that is, where they apply directly to the estate granted. It may be suggested, I think, as universally true, that whenever these words can be treated, under the code, as words of limitation, they are superfluous; and the same may be said of the word "heirs." Any word or words which import a fee-simple can have no effect upon the conveyance as to the quantity of the estate, but the conveyance will pass the fee without as effectually as with them; for, save when a less estate is expressed, the fee always passes, and if a less is expressed, it cannot be enlarged by construction: Code, sec. 2248.

We deem it unnecessary to fortify our conclusion by analyzing the authorities cited by counsel, though we have not failed to examine them before deciding the question.

Judgment affirmed.

WILLS — RULE IN SHELLEY'S CASE. — When an estate in fee-simple passes: *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Shimer v. Mann*, 99 Ind. 190; 50 Am. Rep. 82; *Butler v. Huestis*, 68 Ill. 594; 18 Am. Rep. 589; *Leathers v. Gray*, 101 N. C. 162; 9 Am. St. Rep. 30, and cases collected in note 35; *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note 99-107.

PRATHER v. RICHMOND AND DANVILLE R. R. Co.

[80 GEORGIA, 427.]

RAILROAD COMPANIES — FELLOW-SERVANTS, WHO ARE — NEGLIGENCE — EMPLOYEE OF A RAILROAD COMPANY ENGAGED AS ONE OF A CREW UPON CONSTRUCTION TRAIN, whose business it is to do anything to insure the successful working of the train, is a co-employee with the balance of the crew, including the conductor or boss of the squad and the engineer and fireman of the engine, although at the time of an accident resulting in the death of such employee, the train was moving from one point to another, and the deceased had no active duty to perform; and if he immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, his widow cannot recover for his homicide in an action against the company.

MASTER AND SERVANT. — EMPLOYEE ASSUMES RISK OF PERILS INCIDENT TO HIS EMPLOYMENT, and cannot recover damages for an injury sustained from an accident which is an ordinary peril of the service undertaken by him.

RAILROAD COMPANIES — NEGLIGENCE — BURDEN OF PROOF. — EMPLOYEE CANNOT RECOVER FROM RAILROAD COMPANY unless he be free from fault, and if he is killed while in disobedience of a rule of the company, or an order of the conductor given while he is under the command of that officer, his widow cannot recover for his homicide unless it clearly appears that such disobedience did not, directly or indirectly, contribute in any degree to the injury. The burden to show this rests upon the plaintiff.

RAILROAD COMPANIES. — EMPLOYEE OF RAILROAD COMPANY IS BOUND TO OBEY ALL REASONABLE RULES and regulations of the company, and all reasonable orders of the person who is in command of the squad of whom the employee is one, given either for the protection of the interests of the company or of the employee himself, and if he disobeys these rules or orders, the burden is upon the plaintiff to show that the disobedience did not contribute to the injury. And if it is shown that the employee has disobeyed the orders of his superior, the burden is upon him to show that such disobedience did not contribute in any degree to the injury.

NEW TRIAL. — ALTHOUGH THERE WERE ERRORS IN CHARGE TO JURY, NEW TRIAL WILL NOT BE GRANTED where it appears from the evidence that the injury complained of was the result of an unavoidable occurrence which could not have been prevented by the exercise of even extraordinary diligence.

ACTION against the Richmond and Danville Railroad Company to recover damages for the killing of the plaintiff's

husband. It appeared that the deceased was one of a crew employed on the defendant's construction train, which was used to haul rails and other materials up and down the road to keep the track in repair; and that his death resulted from the derailling of a car on which he was riding at the time, and going to the place where he was to work. Other facts, and the grounds of the motion for a new trial, sufficiently appear in the opinion.

Hoke and Burton Smith, for the plaintiff.

Hopkins and Glenn, for the defendant.

SIMMONS, J. This case comes here on a writ of error sued out by the plaintiff, because she alleges that the court below erred in refusing her a new trial. There are twelve grounds taken in the motion. The first two were not insisted on before us, the counsel admitting that if the court had committed no error, there was sufficient evidence to sustain the verdict. It therefore becomes necessary for us to examine the alleged errors of law, and determine from them whether the plaintiff in error is entitled to a new trial or not. We begin with the third ground of the motion, which is: 3. Because the court erred in charging the jury as follows: "If this was a construction train engaged in the business of carrying laborers' material to be used by them from one point on the road to another, and one or more of the same class of laborers in which the plaintiff's husband was, and selected indifferently from their number, now one and then another, was charged with the duty of manning the brakes of the flat-car, and keeping a lookout and giving signals of danger ahead, then the plaintiff's husband was a co-employee with such other laborers and with the conductor or boss of the squad and the engineer and fireman of the engine, and engaged in the same manner with them; and in order for the plaintiff to recover on this state of facts, it must appear that Wesley Prather was wholly blameless; that is, that he himself was guilty of no negligence which contributed to the cause of the injury. If he immediately or remotely, directly or indirectly, caused it or any part of it, or contributed to it at all, then his wife cannot recover." It is objected to this charge, first, that the court in the charge placed the deceased, when riding on the flat-car, as an employee engaged about the work, although at the time he had nothing to do with the movement of the train; and which required him to be blameless before he could recover.

1. We think the charge was correct. The character of this train and the nature of the deceased's employment must be borne in mind. This was a construction train, used for the purpose of hauling steel rails, dirt, and anything else that was necessary for repairing the road-bed. The evidence shows that this train would have been useless without hands to load and unload it; that it had a crew of from eighteen to twenty-six constantly employed; that Prather, the deceased, was one of this crew, and his business was to do anything to insure the successful working of the train. The train equipped for its work consisted in the locomotive, the steam-power, the cars, and the physical force, of which latter the deceased represented a part. He belonged to this train, and we think was an employee on it, and co-employee with the balance of the crew, although at the time of the accident he had no active duty to perform. The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employee during those times. He could not be an employee whilst at work at one mile-post, and having finished there get on the car to go to the next mile-post, and while riding the mile become a passenger, and at the end of the mile become an employee again. "The true test of fellow-service is community in that which is the test of service,—which is, subjection to control and direction by the same common master in the same common pursuit. . . . 'In order to constitute fellow-laborers, . . . it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same, or even in similar, acts. Thus the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge, and those who hammer it into shape, the engine-man and the switcher, the man who lets the miners down into and afterwards brings them up from the mine, and the miners themselves,—all these are fellow-laborers . . . within the meaning of the term': 3 Wood's Railway Law, sec. 388, and authorities there cited.

It will be seen, by reference to the plaintiff's declaration, that she calls him an employee or "train hand." It must be borne in mind also that this train was not a freight or passenger train, but a gravel or construction train, used by the defendant as such, and not used as common carrier of goods or passengers.

It is argued that this case is covered by the case of *Rich-*

mond and Danville R. R. Co. v. Ayers, 53 Ga. 12. We do not think so. If that case was ruled correctly (of which I have grave doubts), it does not conflict with our ruling in this case. The facts are entirely different. In that case, Ayers did not belong to that train as Prather did to this. He was a "track-raiser," a separate and independent employment from that of a train-hand, who is a part of the crew of the train.

2. The second criticism made upon this part of the charge is, that the use of the words, "immediately or remotely," etc., was argumentative, and calculated to mislead the jury. We do not think that this was error. It was simply a definition of the words "without fault," used by our code. Besides, it is in the very language used by this court in *Mitchell v. Central R. R.*, 63 Ga. 173, when construing section 3036, and defining the meaning of these words, and is not inconsistent with what has been ruled in other cases, that the contributory negligence of the employee must be substantial.

3. Exception is made in the fourth ground of the motion to the charge, because the court charged the jury that "the burden is on the plaintiff to show that her husband was without fault, or that the defendant was in fault." This rule has been so long settled by this court that we do not think it necessary to devote any time to show the correctness of it.

4. In the fifth ground of the motion, the plaintiff in error complains of and criticises the use of the words "ordinary perils," because the jury might infer from it that if accidents frequently happened they were therefore ordinary perils, and no recovery could be had, though the other employees were negligent. We do not think that any such inference could be drawn from the language used. Taken in connection with the charge upon the question of negligence, it is a sound proposition in law. The only adverse criticism we can make upon the charge as given is the use of the word "ordinary." Why confine it to the word "ordinary"? Does not the employee assume the risk of all perils incident to his employment, — necessary, ordinary, and extraordinary, except the negligence of the company, its servants and agents?

5. The sixth ground of the motion complains of the following charge of the court: "The jury is instructed that the law is, that before an employee can recover, he must be free from fault, and if an employee is killed while in disobedience of a rule of the company, or an order of his conductor, given him while he was under the command of the conductor, his widow

cannot recover for his homicide, unless it clearly appear from the evidence that such disobedience did not directly or indirectly contribute in any degree to the injury. The burden is upon the plaintiff to show that he did not thus contribute; and if she has failed to do this, it will be your duty to return a verdict for the defendant."

We see no error in this charge, taken in connection with the entire charge upon the same subject. It is certainly a sound proposition, under the decisions of this court, that before an employee can recover from a railroad company he must be free from fault; and we think it follows that if he is killed while in disobedience of a rule of the company, or an order of his conductor, given him while he is under the command of the conductor, his widow cannot recover for his homicide, unless it appear from the evidence that such disobedience did not, directly or indirectly, contribute in any degree to the injury. The employee is bound to obey all reasonable rules and regulations of the company, and all reasonable orders of the person who is in command of the squad, given either for the protection of the interests of the company or the protection of the employee himself. If he disobeys these rules or orders, the burden is upon the plaintiff to show that the disobedience did not contribute to the injury. The court charged, in substance, that if this employee, the plaintiff's husband, would have been killed whether standing, or sitting with his legs hanging over the car, or not, his disobedience to the order of his superior would not bar the plaintiff's recovery. And the court also charged that if the conductor had given such orders, yet if they were in the habit of riding that way, with the knowledge of the conductor, then a failure to comply with the order would not bar the plaintiff's recovery. Taking the whole charge upon this subject together, we think it was a fair and impartial presentation of the law to the jury.

6. There was no error in charging the jury as complained of in the seventh ground of the motion. We think the rule is well established that if it is shown that the employee has disobeyed the orders of his superior, the burden is upon him to show that such disobedience did not contribute in any degree to the injury: *Central R. R. v. Mitchell*, 63 Ga. 174; *Atlanta etc. R'y v. Ray*, 70 Id. 674.

There was no error in the charge complained of in the eighth ground of the motion. The ninth ground has been considered

in passing upon the third ground, and what has been said in reference to the former will apply to this ground.

7. Nor do we see any error in refusing to charge as set out in the tenth and eleventh grounds. The conductor was in charge of the train. It was an independent train. He represented the company. It was his right and duty to give all necessary orders for the protection of the interests of the company and the safety of its servants. If he gave the order not to sit with the legs hanging over the side of the car, and it was a reasonable order, the servant must obey it. If he disobeyed it and was injured, he could not afterwards say it was not an order, but simply "advice or warning" against danger. Nor could he say that while he was "riding from one point on the road to another, and had nothing to do with the running of the train, it was not such an order as he was bound to obey." The servant is bound to obey all reasonable rules and orders given him by his superior in and about the business of his employment. We have shown in the former part of this opinion that Prather was an employee at the time of the disaster. If he was, and this was a proper order for the protection of the interests of the company, or even for his own safety as such employee, he was bound to obey it. If he disobeyed it and was injured, he must show to the satisfaction of the jury that his disobedience did not contribute to his injury. Nor would it have been proper for the court to have instructed the jury that it was not such an order as required him to obey. The court very properly, in his able, lucid, and impartial charge, left these and kindred questions to the jury, where they properly belong.

8. Admitting, for the sake of argument, that there are errors in the charge, still we would not feel authorized to reverse the judgment of the court below in this case.

We have read the evidence closely and carefully, and have come to the conclusion that the verdict is right, and that the jury were compelled by the evidence to find this verdict. Whether the husband of this plaintiff was standing or sitting, or had his legs hanging over the side of the car or not, in our opinion it would make no difference in the result. It appears to us, from the evidence, that this was an unavoidable occurrence which could not have been prevented by the exercise even of extraordinary diligence. A large preponderance of the evidence clearly shows that there were two cows near the track; that this engine and train were in a deep cut; that

when the first cow was seen, the brakes were applied and the speed of the train was decreased to about six miles an hour; that after the first cow had crossed the track, a second cow suddenly jumped on the track, just as the forward car reached the crossing; it was not seen, and could not have been seen by any one until it started across the track; it was impossible to stop the train after the second cow was seen, or could have been seen; the forward car struck it and was derailed, resulting in the death of the plaintiff's husband. From this it will be seen that the railroad company is not chargeable with fault or negligence; and therefore, whether the plaintiff's husband was at fault or not, she is not entitled to recover.

9. Under the view we take of this case, it is unnecessary to discuss the twelfth ground, in regard to newly discovered testimony, further than to say that some of the testimony is cumulative in its character, and the remainder of it negative, relating principally to whether any orders were given by the conductor in regard to standing up or sitting down with the legs hanging over the side of the car.

Judgment affirmed.

MASTER AND SERVANT—FELLOW-SERVANTS, who are and who are not: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. Rep. 67, and cases cited in note 75. Assumption by servant of risks incident to employment: *Id.*

CONTRIBUTORY NEGLIGENCE—When insufficient to prevent a recovery: *Virginia etc. R. R. Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note

NEW TRIAL.—ERRONEOUS INSTRUCTION WHICH DID NOT INDUCE or influence the verdict is not ground for a new trial: *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789; *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 661, and note. And see *Strohn v. Detroit etc. R. R. Co.*, 23 Wis. 126; 99 Am. Dec. 114, note. For cases in reference to the subject of harmless errors, see *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182, and note; *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279, and note.

TRAVELERS' INSURANCE CO. v. JONES.

[80 GEORGIA, 541.]

INSURANCE — VOLUNTARY EXPOSURE TO DANGER, WHAT IS. — It is "voluntary exposure to unnecessary danger, hazard, or perilous adventure," for a person with two packages in his hands or arms to attempt, by choice, on a dark and stormy night, to walk over a trestle which he knows to be dangerous, other ways of travel being open to him; and this is so, although it was his usual way of travel and his usual route to his home, and many others traveled that way.

JUSTICES OF THE PEACE — NEW TRIAL. — **IRRELEVANT CHARGE BY JUSTICE OF PEACE IS NOT OBLIGATORY UPON JURY,** and when the plaintiff in error has procured the charge to be given as pronounced obligatory, the appellate court will not reverse a judgment granting a new trial, although the verdict was amply justified by the evidence. The prevailing party must take the consequences of a new trial which is justified by an illegal charge prompted by his own counsel.

Frank H. Harris, for the plaintiff in error.

Smith and Borchardt, contra.

BLECKLEY, C. J. Jones had an accident policy, commencing to operate in June, 1884, and continuing of force for one year. In January, 1885, he undertook to pass from some point in the city of Brunswick to his home in that city, and in walking along a railroad track, he stepped upon a trestle several feet in length, consisting of cross-ties elevated some six or eight feet above the bottom of a ditch, and requiring several steps (each from one cross-tie to another) to pass over it. The night was dark and rainy. He had in his arms or hands two packages; and while endeavoring to pass, he made a misstep and fell through and hurt himself seriously. The contract contained a stipulation exempting the company from liability for injuries occasioned by "voluntary exposure to unnecessary danger, hazard, or perilous adventure." The defense was, that this injury was within the exemption; and the evidence showed that Jones knew the place was dangerous; and all the witnesses regarded it as dangerous. There were other ways to reach his home, but that was the usual way he traveled, and many others traveled that way. He had been going that way for ten years; it was his usual route home; but he knew it was dangerous, as he testified himself. A plan of the city in the immediate neighborhood and including the scene of the accident is in the record, from which it appears that there were other ways of access to his house which were open; and we do not see in the record why he

should have taken this risk, unless at his own expense. The suit was in a justice's court, and the magistrate gave judgment against the plaintiff, and he appealed to a jury; the jury found against him, and he carried the case to the superior court by *certiorari*. That court sustained the *certiorari*, and ordered a new trial; the errors alleged being that a certain charge requested by counsel for the insurance company was given by the justice of the peace to the jury, and also that the verdict was contrary to law, to the evidence, to the weight of evidence, and the principles of justice.

1. The judge in ruling upon the case held that the verdict might well be (he does not say that he absolutely judged it to be) contrary to the evidence and the weight of evidence. On this question we differ with him. The verdict was amply justified by the evidence; and the only doubt is, whether it was not compelled. For my own part, I can scarcely see how the jury could have rendered any other verdict. But this is eminently a question for the jury, and if the instructions of the court had been correct, we should have no hesitation in overruling his honor in sustaining this *certiorari*.

2. But there is a very faulty charge, procured at the instance of counsel for the prevailing party. That charge is so flagrantly illegal, as applied to the facts of this case, that we do not feel authorized to reverse the judgment, since the error was caused by the now complaining party, through its counsel. There was no occasion for it. It seems to have been as unnecessary a hazard as the crossing of the trestle. It was a kind of trestle in the case,—a trestle that one had to go out of his way to walk over. This being so, we affirm the judgment. The charge to which we allude, and which, so far as appears, embraced all the instructions given to the jury, was as follows: "I charge you that if you should find from the evidence that the plaintiff, Robert Jones, received injuries while voluntarily exposing himself to unnecessary danger, hazard, or perilous adventure, then the verdict must be for the defendant; that when a contract is reduced to writing, it then becomes the evidence of what that contract is, and that the presumption is, that when a man signs a contract he does it with full notice of its terms and conditions, and that a man would not be allowed to say that when he signed it he did not know the contents, unless he further showed that the other party had committed a fraud upon him by false representations of its contents, and that he could not read. I charge

this to be the law of this case, and under it you must find your verdict." The whole of this charge as to reducing the contract to writing, presumption, full notice, fraud, false representations, could not read, etc., is irrelevant to anything found in the record. But the hurtful instructions were, that "under it, you must find your verdict." The most of it should have been wholly disregarded in finding the verdict. Why should such an irrelevant charge be pronounced obligatory upon the jury? To recite a state of facts not in dispute, and add, "I charge this to be the law of this case, and under it you must find your verdict," is not a fair or safe mode of submitting the real controversy to a jury. The other side was not submitted at all.

Judgment affirmed.

WHAT IS DEATH BY VOLUNTARY EXPOSURE TO UNNECESSARY DANGER, HAZARD, OR PERILOUS ADVENTURE. — Death by "voluntary exposure to unnecessary danger," within the meaning of the usual exemption clause in policies of insurance against accident, is where the insured intentionally does some unnecessary act which reasonable and ordinary prudence would pronounce dangerous, and his death occurs in consequence thereof. If the danger was obvious, the exposure to it voluntary and unnecessary, and the death of the insured ensued in consequence, the case may fairly be held to be within the exception in the policy: *Tuttle v. Travelers' Ins. Co.*, 134 Mass 175; 45 Am. Rep. 316; *Morel v. Mississippi Valley Ins. Co.*, 4 Bush, 535; *Sawtelle v. Railway Co.*, 15 Blatchf. 216. But the rule is otherwise, if the injury occurred while the insured was unconscious, and acting involuntarily, without knowing or realizing what he was doing. As where the insured while traveling by railway fell asleep from weariness and the motion of the cars, and while asleep and unconscious involuntarily arose and walked to the platform of the car, and fell therefrom to the ground and was injured, this was held not to be a case of "voluntary exposure to unnecessary danger," within the meaning of the condition exempting the insurer from liability: *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 46 Am. Rep. 618. Such condition relieves the insurer from liability only when the injury results from an act committed by a party who was at the time conscious of the nature of the act: *Id.*; and see *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389. So the act may be voluntary, and the exposure be involuntary, as where one voluntarily approaches an unknown and unexpected danger. The danger being unknown, the injury is accidental. Thus the insured stepped off a railway train stopped at a drawbridge at night, and fell through a hole in the bridge, the existence of which he had no reason to suspect, and was killed. It was held that the death of the insured was caused by an "accident," and that the case was not within the condition exempting the insurer from liability for death or injury caused "by voluntary exposure to unnecessary danger": *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 204. So while an accident may happen from an unknown cause, it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party: See *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am

St. Rep. 758, and note 763. And where the insured was killed while attempting to get upon a train of cars in slow motion, it was held that this was not such wanton exposure as would excuse the insurance company from liability under a provision in the policy that the company should not be liable for any injury happening to the insured by reason of his "willfully and wantonly exposing himself to unnecessary danger or peril": *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157. So where the insured, a locomotive engineer, while backing his engine at a moderate rate of speed, on a down grade, attempted to pass from the tender to a car attached, in order to apply the brakes, and slipped, fell, and was killed, it was held that he had not willfully exposed himself to an "unnecessary peril," within the exception in the policy: *Provident Life Ins. Co. v. Martin*, 32 Md. 310. So an accident policy contained a provision requiring the insured "to use all due diligence for his personal safety and protection." The insured was killed by falling from the second story of a small barn which he was having built, in consequence of the breaking of a joist having a secret defect, and upon which he had stepped to look on at the work. It was held that the fact of death, under the circumstances, did not conclusively show a breach of the stipulation in the policy, but the question was one properly left to the jury: *Stone v. United States Casualty Co.*, 34 N. J. L. 371.

It is, however, held that under the provisions of a policy insuring the holder against accidents while traveling on the conveyances of any common carrier, provided he complied with the rules and regulations of such carrier, and exercised due diligence for self-protection, he cannot recover on the policy, where, being a passenger on a railway car, he was injured by being thrown from the steps of the car, where he stood while the train was approaching a station in violation of the carrier's rule, known to him: *Bon v. Railway Passenger Assurance Co.*, 56 Iowa, 664; 41 Am. Rep. 127. So a policy of insurance against accident provided, among other things, that there should be no recovery "when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger"; and it also contained a condition that the party insured should "use all due diligence for personal safety and protection." It was held that both of these provisions were violated by the act of the insured, who was killed by being struck by a railroad train, while running along the tracks in front of it for the purpose of getting on a train approaching in an opposite direction on a parallel track, and that there could be no recovery under the policy: *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175; 45 Am. Rep. 316. In this case, the conduct of the deceased was declared to be such as is condemned by the general knowledge and experience of all prudent men, and was conclusive upon the question of due care. It was the case of a person voluntarily placing himself in a position where he was exposed to an obvious danger, and the precise injury happened to him which there was reason to fear would happen, and he should be held to take the risk of the results: *Id.*; and see *Wright v. Boston etc. R. R. Co.*, 129 Mass. 440. But what constitutes due care must depend upon the facts of each particular case. And it is held that a provision in an accident policy exempting the insurer from liability for any injury happening to the insured by reason of his "willfully and wantonly exposing himself to unnecessary danger or peril," necessarily implies that any degree of negligence falling short of such willful and wanton exposure will not prevent a recovery. In such case, although the negligence of the insured may have contributed to produce the injury resulting in his death, yet it cannot be held that the death was not occasioned by an "accident," within the meaning of the policy. To

prevent a recovery, the act of the insured must have amounted to a reckless exposure of his person to an obvious risk of danger: *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; and see *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205.

The fact that a person insured as a farmer was drowned while aiding in the rescue of persons from a wreck is not death caused by "voluntary exposure to any unnecessary danger." It was his duty to aid the shipwrecked crew: *Turber v. Mutual Benefit Life Ins. Co.*, 50 Hun, 50.

ABRAHAMS v. ANDERSON.

[80 GEORGIA, 570.]

EXECUTION — EXEMPTION. — WAGES OF ONE EMPLOYED AS A STENOGRAPHER OR PRIVATE SECRETARY are exempt from execution under the code of Georgia, which declares that all journeymen, mechanics, and day-laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly, or monthly wages, whether in the hands of their employers or others.

Garrard and Meldrim, for the plaintiff.

Lawton and Cunningham, for the defendants.

SIMMONS, J. It appears from the record that Abrahams sued out process of garnishment in a suit pending against Andrew Anderson, in the city court of Savannah, and caused summons of garnishment to be served upon the Central Railroad and Banking Company of Georgia. Anderson dissolved the garnishment by giving bond. At the next term of the court, the Central Railroad and Banking Company answered that it was indebted to the defendant at the date of the service of the summons of garnishment \$38.70, and had since become indebted to the defendant \$328.91; which amount, it answered, was due him for his wages as a laborer, and that such wages are exempt from garnishment. The answer was traversed by Abrahams. The evidence on the issue thus made was agreed to in writing, and submitted to the court without the intervention of a jury. The agreed statement of facts was as follows: "Andrew Anderson, Jr., was at the time of the suing out of the garnishment process, and is now, employed at a salary of \$125 per month, there being no time fixed for the termination of the contract of service, as private secretary and stenographer to the president of the Central Railroad and Banking Company of Georgia, . . . his duties being to receive by dictation and to transcribe for the president his letters and such other papers and documents as he may desire; to take care of the

papers and records of his office; travel with him as secretary when required; to receive and forward the president's mail when left in the office in the absence of the president; and generally to perform the duties of an amanuensis, stenographer, and private secretary, including the keeping of such books and statements as would generally be kept in the office of a president of a railroad company."

The judge of the city court overruled the traverse, and decided that the salary of the defendant was exempt from garnishment; whereupon the plaintiff excepted, and assigned as error,—1. That the court erred in overruling the traverse; and 2. That the court erred in deciding that the salary of the defendant was exempt from process of garnishment.

1. This case seems to be ruled by the cases of *Lamar v. Chisholm*, 77 Ga. 306, decided at the October term, 1886, of this court; *Smith v. Johnston*, 71 Id. 748; *Hightower & Co. v. Slaton*, 54 Id. 108; 21 Am. Rep. 273; *Claghorn and Cunningham v. Saussy*, 51 Ga. 576; *Butler, McCarty, & Co. v. Clark & Co.*, 46 Id. 466; *Caraker v. Matthews and Matthews*, 25 Id. 574. It is difficult to distinguish the case now before us from these cases. In the case of *Lamar v. Chisholm*, *supra*, the employee was a clerk and book-keeper in the store of Chisholm & Co., who were commission merchants, dealing in cotton, rice, and naval stores. In the case of *Claghorn and Cunningham v. Saussy*, *supra*, the employee was a forwarding clerk, whose business it was to attend to the forwarding of freight, and assist in checking up the books at night. In the case of *Smith v. Johnston*, *supra*, the employee was a clerk of the Green Line Agency. In all these cases, the duties of the employee were not only to use his hands, but his brains. Anderson's duties in the case before us were somewhat of the same character. Calling him private secretary instead of a clerk does not, in our opinion, change the principle upon which these former rulings were made. Instead of keeping a set of books, and recording the daily transactions of a firm, as the clerks did in the cases cited, Anderson's duties were to receive by dictation and transcribe for the president of the company his letters and other papers and documents, and generally to perform the duties of an amanuensis, stenographer, and private secretary, including the keeping of such books and statements as would generally be kept in the office of the president of a railroad company. There being, therefore, no difference in principle in the cases cited and the case now before us, we affirm the

ruling of the court below in holding that the wages of this employee were exempt from garnishment.

Judgment affirmed.

GARNISHMENT — WHAT CLAIMS MAY BE SUBJECTED TO PROCESS OF *Teague v. Le Grand*, 85 Ala. 493; 7 Am. St. Rep. 64, and note 66. In Nebraska, statutory exemption from garnishment of wages of employees, who are heads of families, extends to non-resident employees: *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747.

SCHOOL DISTRICT CANNOT BE GARNISHED FOR TEACHER'S WAGES: *School District v. Gage*, 39 Mich. 484; 33 Am. Rep. 421; and see *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 273; and generally the salary or wages due an officer or servant of a municipal corporation is not liable, in the hands of such corporation, to garnishment at the suit of a creditor: *Memphis v. Laski* 9 Heisk. 511; 24 Am. Rep. 327; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *McLellan v. Young*, 54 Ga. 399; 21 Am. Rep. 276; *contra*, *Rodman v. Musselman*, 12 Bush, 354; 23 Am. Rep. 724.

ATTACHMENT AND GARNISHMENT — WHAT PROPERTY SUBJECT TO — RECENT CASES. — The wages of a clerk and book-keeper are not subject to garnishment: *Lamar v. Chisholm*, 77 Ga. 306. The monthly wages of an engineer employed by a railway company are not subject to garnishment; and this is true in Georgia, even though his wages exceed the sum of five hundred dollars per annum: *Sanner v. Shivers*, 76 Id. 335. An employee's monthly salary, payable monthly, is not subject to garnishment served prior to the close of the month in which it was earned: *Foster v. Singer*, 69 Wis. 392. And ordinarily it is the rule that the wages of an employee for the last thirty days are not subject to garnishment or execution: *State v. Barnett*, 96 Me 133.

GAMBLE v. CENTRAL RAILROAD AND BANKING CO

[80 GEORGIA, 595.]

A JUDGMENT RECOVERED IN AN ACTION FOR A TORT is not assignable before it comes into being, that is, before it has been rendered or entered up, although a verdict has been returned upon which judgment can be and is afterwards signed. The plaintiff acquires title, not by the verdict, but by the judgment, and until its rendition he has no title to assign; until then his action for the tort is not terminated, but is still pending and in progress.

THE DEFENDANT IN AN ACTION FOR A TORT is not subject to garnishment till final judgment is recovered. A garnishment issued and served after a first verdict for the plaintiff in the action, which verdict is subsequently set aside, and a new trial granted, and answered before a second trial is had, the answer denying any indebtedness, seizes nothing, and takes no lien on the final recovery.

A NOTE EXECUTED IN GEORGIA, but payable in Alabama, waiving homestead and exemptions, and specifying a conventional rate of interest after maturity, which rate was not usurious according to the laws of Georgia, is not, after a general judgment has been rendered thereon in Georgia, open to inquiry, at the debtor's instance, as to whether it was usurious according to the laws of Alabama or not. No exemption right embraced

in the waiver, as to property or effects of the debtor found in Georgia, will prevail over the judgment; the note being made since the present constitution was adopted, and being free from usury so far as appears upon its face without going into evidence as to the law of Alabama.

A MISNOMER IN THE NAME OF A PARTNERSHIP CREDITOR (such as J. P. Sarrazin & Son for J. P. Sarrizin's Son & Co., or M. C. Kiser & Co. for M. C. and J. F. Kiser & Co.) in the list of creditors furnished to the ordinary, and in addressing notice to the partnership, will not vitiate the exemption proceedings or render them ineffective against such partnership. **THE PRESUMPTION IS IN FAVOR OF THE LOCAL JURISDICTION** of the ordinary granting an exemption; and in this case there was no evidence to overcome such presumption, nor any whatever in conflict with it.

GAMBLE recovered a verdict in his favor against the Central Railroad and Banking Company, which was set aside by the grant of a new trial in November, 1884, affirmed by the supreme court, in *Gamble v. Central Railroad Co.*, 74 Ga. 586. In September and October, 1884, certain partnership creditors served summonses of garnishment on the railroad company, which were answered in December, 1884, the answers stating that Gamble claimed damages of the company, but denying any indebtedness to him therefor. In March, 1885, one of the creditor firms, and in March, 1887, another of the creditor firms, traversed the answers. Gamble's suit against the railroad company was again tried in March, 1886, resulting in a verdict against the company for four thousand dollars, and judgment was entered on the following day. After the verdict, but before judgment was entered, Gamble made partial assignments of it in consideration of prior indebtedness to the assignees, subject to the liens of his attorneys for their fees. Other creditors also claimed liens. In April, 1887, the railroad company filed its bill against Gamble and all these other parties, praying that certain of them be enjoined from prosecuting their suits at law, and that the several parties might interplead to settle their respective rights. The substance of certain other facts necessary to an understanding of the case sufficiently appear in the head-note and opinion.

R. R. Richards and J. A. Cronk, for the plaintiffs in error.

Hillyer and Brother, Denmark and Adams, and Lester and Ravenel, contra.

BLECKLEY, C. J. 1. All judgments are assignable: Code, secs. 2776, 3797. But are they assignable before they are judgments? That is, when they are in merely potential, not actual, existence?

Here the plaintiff, in an action of tort for a personal injury,

having obtained a verdict for four thousand dollars damages, attempted, not for any new consideration, but in payment of pre-existing debts, to assign to his wife an interest in the prospective judgment to the extent of seven hundred dollars, and to his brother a like interest of three hundred dollars. Upon the following day, judgment on the verdict was entered up and signed, whereby the plaintiff in the action recovered of the defendant therein the whole four thousand dollars. This judgment, which was silent as to any interest of the wife or brother, was conclusive evidence that between the parties thereto the relation of debtor and creditor then existed with respect to the whole sum of four thousand dollars. Indeed, it was the judgment that created the debt, as a debt strictly. It was by it that the plaintiff acquired his title to the judgment itself, and his specific right to its specific produce. Previously he had no such title absolutely vested, but in lieu thereof the right to prosecute his action to a final termination, and the general right to take its fruits; and these he did not try to part with or assign. For some purposes the judgment, when duly entered up, related back, but relation could not give to the assignments a subject-matter, and thus obviate their invalidity resulting from the want of it. It may safely be concluded that neither the judgment nor any part of it was effectually assigned. No title thereto having yet accrued, none could be communicated or transferred, unless the cause of action was assignable and was in fact assigned, in which case the judgment perhaps might pass by operation of law as a consequence of the previous assignment of the assignable cause of action: *Dugas v. Mathews*, 9 Ga. 510; 54 Am. Dec. 361.

There can be no doubt that, until the judgment was actually rendered, the action for the tort was still pending, for save in a pending action no judgment can be rendered. After an action has ceased to be pending, after it has terminated, no judgment that the plaintiff does recover can be entered up; nor, until after final judgment, can either party, as a general rule, have a writ of error, the reason being that prior to that stage the action has not terminated. We think that in Georgia, whilst an action is pending for a tort, there can be no legal assignment of the cause of action or of the damages to be recovered. Authorities differ somewhat as to whether rights of action for torts are choses in action, but the code, section 2243, settles the question affirmatively for us; and in the next section it treats them by implication as non-assignable, for it pro-

vides that "all choses in action, arising upon contract, may be assigned so as to vest the title in the assignee." On the principle that the mention of one thing is the exclusion of another (*expressio unius exclusio alterius*), choses in action arising from torts are not assignable in this state, whatever the rule may be elsewhere. If it be said that the code speaks of legal assignments, and means by "title" legal title, this is probably true; but we see not why the same policy, which denies assignability at law to redress for wrongs, should not do it in equity, especially where no new equity is created when the assignment is attempted, and only a pre-existing debt between the parties is involved in the consideration. We are unable to see why equity should aid a creditor who has no judgment to defeat one who has, and thus enable the debtor to make a preference in equity which he could not make with the same resources at law. Without some special equity to found it upon, the equitable right to make preferences is measured by the legal right, and so, too, of the means to be employed or used for the purpose.

As the assignees acquired from the assignor no title to the fund, they have at most a mere equitable claim upon it, in the nature of a lien. The fund is to be administered as his assets, not as theirs in whole or in part; and being legal assets, legal priorities prevail: Code, sec. 3142; *Robinson v. Bank of Darien*, 18 Ga. 65; *Dowell v. Dickle & Co.*, 55 Id. 177. It follows that the judgment creditors are entitled to be paid in preference to the assignees, and that the ultimate result arrived at below was correct as to these two plaintiffs in error. Being entitled to nothing, they got nothing.

2. With respect to the garnishments, little need be said beyond what appears in the second head-note, inasmuch as the view we have taken of the assignments deprives the garnishments of all materiality as a factor in the litigation. It is a misconception and misapplication of *Walker v. Zorn*, 56 Ga. 85, to treat it as authority for garnishing a tort-feasor before final judgment is rendered against him. It is authority for garnishing a debtor by contract, though the action in aid of which the garnishment issues be *ex delicto*, like the count for mesne profits in ejectment. In the present case, if the garnishee had delayed answering until after final judgment, though the garnishments were served before, they would have been effective: Code, secs. 3536 a, 3536 b. The latter of these sections makes "all debts owing to the defendant" subject to garnish-

ment, but prior to final judgment the damages for a tort are not a "debt" in the strict sense contemplated by the garnishment laws. Nor was it the purpose of *Westmoreland v. Powell*, 59 Ga. 256, to hold that torts would make debts, save so far as to bring the injured party within the protection of the statutes for the prevention of conveyances and transfers of their property by debtors in fraud of their creditors. The principle of equitable construction would justify that decision without any strain whatever of the words "debt," "debtor," or "creditor."

3. To what is said of usury and waiver of exemption in the third head-note, we will add that in *Cleghorn v. Greeson*, 77 Ga. 343, the usury appeared on the face of the judgment as well as in the contract declared upon, and that the law which it violated was our own, and not that of another state. We are not to be understood as ruling by implication that the law of Alabama would vitiate a waiver of exemption made here in favor of a debt pure by our law, though payable in that state, but only that the question cannot be made after judgment, no usury appearing upon the face of the record, and none being alleged save that which is obnoxious to the foreign law only.

4. The misnomer of the two partnerships in the exemption proceedings did not render those proceedings void as to these two creditors, or either of them. There is a reasonable probability that the notices addressed as they were reached the firms for which they were intended, and if they did not, their failure is susceptible of proof, and there is no suggestion of the sort in the evidence. We think that *prima facie*, at least, such misnomers would be harmless, in view of the general certainty that matter carried through the mails will, in spite of much imperfection in the address, reach its proper destination. This certainty is so notorious as to belong to public history, and can therefore be noticed judicially. The cases of *Smith v. Lord*, 60 Ga. 462, and *Burroughs v. White*, 69 Id. 842, are neither of them in point, as will be seen by reading them.

5. There was no evidence whatever to negative the jurisdiction of the ordinary of Muscogee County to entertain the application for exemption and conduct the exemption proceedings, and the verdict on that branch of the case was unwarranted. The proceedings being regular, the presumption is in favor of the jurisdiction till the contrary is established.

The result is, that the judgment below as to the assignees is affirmed; as to the debtor (whose motion for a new trial was denied), it is reversed.

JUDGMENTS. — TORT IS MERGED IN JUDGMENT WHICH IS BASED THEREON, and such judgment is assignable: *Charles v. Haskins*, 4 Iowa, 329; 77 Am. Dec. 148. See, generally, as to what judgments may be assigned, *Dugas v. Mathews*, 9 Ga. 510; 54 Am. Dec. 367, note.

GARNISHMENT — CLAIMS SUBJECT TO: See *Abrahams v. Anderson*, ante, p. 274, and note.

CONFLICT OF LAWS — FOREIGN ATTACHMENT: *Winslow v. Fletcher*, 53 Conn. 390; 55 Am. Rep. 122, and note 129-140. Interest and usury: *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Bowman v. Miller*, 25 Gratt. 331; 18 Am. Rep. 686; *Overton v. Bolton*, 9 Heisk. 762; 24 Am. Rep. 367; *Merchants' Bank v. Griswold*, 72 N.Y. 472; 28 Am. Rep. 159; *Scott v. Perlee*, 39 Ohio St. 63; 48 Am. Rep. 421.

CONFLICT OF LAWS — USURY. — The defense of usury not having been set up, the court cannot declare a contract made in another state usurious, even though upon its face it bears interest at a higher rate than allowed by the law of such state: *Reiff v. Bakken*, 36 Minn. 333.

LEWIS v. LEWIS.

[80 GEORGIA, 703.]

MARRIAGE AND DIVORCE — ENFORCEMENT OF DECREE DIRECTING PAYMENT OF ALIMONY. — Where the husband fails to comply with a final decree in the wife's favor for alimony, such failure not arising from lack of means to comply, the court may compel compliance by an order of attachment directing his imprisonment until he obeys the decree. The enforcement of the decree by attachment for contempt is not equivalent to imprisonment for debt, and a violation of the constitution and laws of Georgia.

J. H. Martin, for the plaintiff in error.

W. L. Grice, contra.

BLANDFORD, J. This was an attachment for contempt, granted upon the motion of the wife, against the husband (the plaintiff in error), because of his failure to comply with a final decree in her favor for alimony. The plaintiff in error contends that the court below had no power to attach him for contempt upon this ground; that this was a decree for money, and was a final disposition of the case, and that its enforcement by attachment for contempt would be equivalent to imprisonment for debt, and therefore contrary to the constitution and laws of this state.

We are of the opinion that when a court directs the payment of alimony by a husband to his wife, it is a duty he owes, not only to his wife, but to the public, to comply with the order; and if he fails to perform that duty, we see no reason why the court cannot compel him to do so by an order of

attachment, directing his imprisonment in the event of his failure to comply with the order. Of course this is a power which should be carefully and cautiously exercised, and before granting the writ, the court ought to be satisfied that there is good ground for the attachment; and such appears to have been the case here. This is a case in which the old adage applies, that "when a bird can sing and will not sing, he must be made to sing." When it appeared to the court that this defendant had the money to comply with the decree, and that he failed to comply with it, we think the court had the right and the power to imprison him until he did comply with it.

Judgment affirmed.

MARRIAGE AND DIVORCE — ENFORCEMENT OF JUDGMENT FOR ALIMONY. *Livermore v. Boustelle*, 11 Gray, 217; 71 Am. Dec. 708, and note 711.

ONE UNABLE PROUNIARILY TO PAY ALIMONY ADJUDGED AGAINST HIM is not guilty of contempt of court in not paying it when he has not voluntarily created the inability for the purpose of avoiding payment: *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167. Compare *Clements v. Tilbman*, 79 Ga. 451; 11 Am. St. Rep. 441, and note.

GEORGIA PACIFIC RAILWAY CO. v. STRICKLAND.

[80 GEORGIA, 776.]

EVIDENCE. — SECONDARY EVIDENCE IS NOT ADMISSIBLE until the non-production of the primary evidence has been sufficiently accounted for, and this rule applies to a bond for titles relied upon in an action for the recovery of land.

ESTOPPEL — FAILING TO OBJECT TO IMPROVEMENTS MADE ON LAND BY ADVERSE CLAIMANT. — If one attests a deed knowing its contents, and afterwards stands by and sees work performed and money expended on the premises, without objecting thereto, he is estopped from asserting an older adverse title in himself to the premises, and he cannot recover them in opposition to the deed to which his attestation gave authenticity and credit.

RAILROAD COMPANIES — FROM WHAT TIME POSSESSION DATES UNDER GRANT OF RIGHT OF WAY. — Possession by a railroad company and its successors, under a grant which contemplates the construction and operation of a railroad, dates from the time construction commences, and not merely from the time the road is completed and trains begin to run.

ACTION brought June 30, 1885, by W. P. Strickland against the Georgia Pacific Railway Company, to recover land described in the complaint as land occupied by the railroad track and right of way of said company. It appeared on the

trial that some time during the year 1870, one Vanzant had given bond for title to the premises in dispute to the plaintiff Strickland, and that the latter had entered into possession; but the original bond for title was not produced, and the court admitted parol testimony as to the paper's contents. A deed was made from Vanzant to Strickland in April, 1873, covering the premises, but not reciting or referring to the bond for titles. It further appeared that in December, 1871, Vanzant conveyed a right of way to the Georgia Western Railroad Company through the land in dispute, the deed being witnessed by one Flake, an agent of the railroad company for the purpose of procuring rights of way, and by the plaintiff Strickland, and that the deed to the railroad company was recorded in April, 1873, prior to the deed to Strickland, which was not recorded until 1887. It further appeared that, in January, 1884, the Georgia Pacific Railway Company became the successor (by purchase at sheriff's sale), and used the franchise and privileges of the Georgia Western company; that in 1873 or 1874, the Georgia Western railroad was graded through the land in dispute, and that in 1881 the track of the Georgia Pacific company was laid along this graded way. Other facts appear in the opinion. The jury found a verdict for the plaintiff, the defendant's motion for a new trial was overruled, and the defendant excepted.

J. S. James, for the plaintiff in error.

W. A. James and R. A. Massey, contra.

BLECKLEY, C. J. The record is such a medley and mass of stuff that it is impossible to tell in any reasonable time how many errors are covered up in it. We shall deal with only a few of the most obvious points, and leave the case to come up hereafter in a better shape if either of the parties think proper to bring it here again.

1. It was error to admit parol evidence of the contents of the alleged bond for titles from Vanzant to Strickland, the bond being relied upon in the abstract of title, and its non-production not being sufficiently accounted for. If it was in existence and accessible to the party wanting to use it, it should have been produced. If it was lost or destroyed, the fact of its loss or destruction should have been proved as a necessary preliminary to proving its contents by other evidence.

2. If the railroad was graded under the deed from Vanzant to the Georgia Western Railroad Company, the work of grading was a part payment of the consideration for that deed, and the subsequent finishing of the road by the successor of that company was the completion of the payment. Strickland, having witnessed the execution of that deed with a knowledge of its contents, was bound to object to the construction of the work, if he claimed title to the premises; and as he did not do so, he is estopped from asserting his title. He is in the situation of one who sees another purchase property, and pays for it, and then endeavors to recover it on a title which he did not disclose. That the agent who took the deed in behalf of the company knew of his claim of title would have been notice to the Georgia Western company, if Strickland had not by attesting the deed virtually given the company written notice to the contrary. When he attested the deed by which Vanzant conveyed the right of way, he impliedly assented to that deed; and if he meant that it should not affect his rights, he ought to have objected to the construction of the road, he having, according to the evidence in the record, actual knowledge both of the contents of the deed and of the work done on the premises at all stages of its progress. His mere attestation of the deed would not have been binding upon him if he had not afterwards stood by and seen money expended on the faith of it. Certainly the Georgia Pacific company had no reason to apprehend that he would ever assert a title in opposition to the deed which he had attested; that company, so far as appears, had no notice whatever of any claim on his part adverse to the title which the Georgia Western company acquired under the deed,—the very deed to which his attestation gave authenticity and credit.

3. We do not agree with the apparent position of the court below, that a railway company is not to be considered in continuous, actual, and adverse possession of its graded, or partially graded, work until after track is laid, and trains begin to run. We think, on the contrary, that entering upon the right of way under a conveyance of it, and grading, or partial grading, the line at a given place, will constitute possession at that place, and that mere delay to finish the work and put on trains will not hinder the possession from being complete and continuous. It may take years to finish the work of a railroad, and the prosecution of the work may be suspended

and resumed many times. No mere suspension of work will oust the company from possession. In determining whether there is possession or not under a grant, the nature and purpose of the grant must be considered; and a grant which contemplates the construction and operation of a railroad involves for its enjoyment the possession of the premises from the time construction commences, and during the whole period construction is in progress.

The application of these views to the present case will carry back the possession to the time when the Georgia Western company entered under the grant to it from Vanzant, and began to construct its roadway by clearing and grading for the same on these premises.

The court erred in not granting a new trial.

Judgment reversed.

EVIDENCE. — PROOF OF LOSS OR DESTRUCTION OF RECORD OR OTHER DOCUMENT as foundation for admission of secondary evidence: *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456, and note 464. Rule as to proof of written instruments and records does not include oral testimony of the existence of such instruments and records, preliminary to their introduction or proof of loss: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144. Secondary evidence of the contents of a written instrument is inadmissible in the absence of proper diligence to secure the original: *Low v. Tandy*, 70 Tex. 746. When the terms of a written instrument are material in one of the aspects presented by the pleadings, though immaterial in other aspects, secondary evidence of its contents cannot be admitted until a sufficient predicate has been laid: *Trammell v. Hudmon*, 86 Ala. 472; but see *Aye v. Gribble*, 70 Tex. 458. It is error to admit a record copy of a deed when the deed itself is in possession or under control of him who seeks to admit the record thereof: *West v. Cameron*, 39 Kan. 736. Sufficient foundation, by way of preliminary proceedings, must be made before the introduction of secondary evidence of the contents of a deed: *Berdel v. Egan*, 125 Ill. 298.

ESTOPPEL — ESSENTIAL ELEMENTS OF: *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307, and note 311; *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17; estoppel by silence or failure to assert one's right: *Id.* 22.

DALY v. GEORGIA SOUTHERN AND FLORIDA R. R. Co. GEORGIA SOUTHERN AND FLORIDA R. R. Co. v. DALY.

[80 GEORGIA, 793.]

MUNICIPAL CORPORATIONS. — GEORGIA ACT OF 1857 (Acts 1857, p. 182), conferring power upon municipal corporations to permit and sanction encroachments on their streets for a reasonable compensation in money to be paid into the city treasury, confers no authority upon the mayor and council of a city to grant to a railroad company, as an encroachment, a block of land eighty feet wide and four hundred and eighty feet long in one of the city streets. The meaning of the act is to allow the grant of small encroachments to property holders along the length of the streets and on both sides thereof, in order to narrow them.

MUNICIPAL CORPORATIONS. — UNDER AUTHORITY GIVEN TO MUNICIPAL CORPORATIONS by Georgia act of 1857 (Acts 1857, p. 182), "to permit and sanction encroachments for a fair and reasonable compensation in money paid into the city treasury," the mayor and council of a city have no power to make a donation of ten acres of land of the city commons to a railroad company, and afterwards grant to such company large encroachments upon a street of the city, the consideration therefor being the return of the ten acres of land to the city.

MUNICIPAL CORPORATIONS. — IT IS IMPROPER AND ILLEGAL FOR ANY MEMBER OF CITY COUNCIL to vote upon any question brought before the council in which he is personally interested.

RAILROAD COMPANY USING STEAM MOTORS CANNOT LAY ITS TRACK LONGITUDINALLY upon the streets of a town or city, without the sanction of the legislature of the state expressly appearing, or arising from necessary implication.

MUNICIPAL CORPORATIONS. — GENERAL CLAUSE IN CHARTER OF CITY, GIVING IT POWER TO CONTROL ITS STREETS, is not sufficient to authorize the corporate authorities to grant to a railroad company the privilege of laying its tracks along the streets of the city.

MUNICIPAL CORPORATIONS. — FREE TO STREETS IN CITY OF MACON IS IN THE STATE, and the right to use them for any other than the ordinary use of streets should proceed from the legislature. While a railroad company may have the right, under its charter, to enter the city, it must buy or condemn its right of way like individuals or other corporations, or it must have legislative authority before it can appropriate the streets for laying its tracks and operating its road.

F. J. M. Daly, in propria persona, and Lanier and Anderson,
for the plaintiff.

Guerry and Hall, and Bacon and Rutherford, for the defendants.

SIMMONS, J. F. J. M. Daly, as trustee for his wife and children, and as guardian for Mary Dowd, and as a citizen and tax-payer of the city of Macon, filed his bill against the mayor and council of that city, against the Georgia Southern and

Florida railroad, and against the Macon Construction Company, in which he alleged that the mayor and council of the city of Macon had, by an ordinance or resolution, granted unto the railroad company, over the protest of the complainant and other tax-payers and property holders of the city, an encroachment eighty feet wide and four hundred and eighty feet long on Fifth Street, said encroachment being opposite the property owned by him as trustee, etc.; and that it would greatly injure and damage his property; that the tenants had given him notice that they would give up the premises in case said encroachment was granted; and alleged other special damage to him as a property holder. He also complains that the mayor and council granted the railroad company the right to lay its tracks on said Fifth Street, longitudinally, one mile. He alleges that the mayor and council have no power, under the charter of the city, either to grant the encroachment or to authorize the railroad company to lay its tracks longitudinally on said Fifth Street; and that even if the city had power to grant such encroachment, it could only do so upon a money consideration, having due regard to the rights of property holders; that five dollars is not such a consideration; nor is the fact that the mayor and council had prior thereto granted the railroad ten acres of land, and the railroad company had agreed to return it to the city, a sufficient consideration, under the act of 1857. Other allegations are made in the bill as to the mode and manner of granting said privileges by the mayor and council, over the protests of tax-payers and property owners, it being alleged that several of the aldermen, who voted to grant said privileges, were disqualified from voting thereon, because of their being stockholders in the Macon Construction Company and said railroad company. The bill also alleges that the railroad company had never been authorized by the legislature to lay its tracks and run its steam-engines along said Fifth Street, and that the mayor and council could not grant, nor could the railroad company accept, such a privilege without special legislative authority. Other allegations are made in regard to the insolvency of the railroad company, and as to the complainant's damages not having been first paid, etc.; which, under the view we take of this case, it is unnecessary to notice here.

The mayor and council answered the bill, and claimed that they did have authority to grant the encroachment, and

to grant the privilege to the railroad company of laying its tracks longitudinally on said Fifth Street. The railroad company and the Macon Construction Company also answered, but it is unnecessary to state the facts set out in their answers. It is also unnecessary to state the evidence contained in the affidavits read before the chancellor. Upon the hearing, the chancellor enjoined the mayor and council from granting the encroachment, and the railroad company from receiving it, and refused to enjoin the railroad company from laying its tracks on Fifth Street. To the granting of the injunction the mayor and council excepted, and to the refusal to enjoin the railroad company from laying its tracks upon the street, Daly excepted.

1. We think the chancellor was right in granting the injunction against the so-called encroachment. We do not think that under the act of 1857 (Acts 1857, p. 182), the mayor and council have the power or authority to grant such an encroachment as this. We do not think that the legislature, when it passed that act, contemplated that the mayor and council would have the right or authority, or would ever claim the right, to grant to a railroad company a block of land eighty feet wide and four hundred and eighty feet long in one of the busiest streets of the city. Our idea is, that the meaning of the act of 1857 is to allow them to grant small encroachments to property holders along the whole length of the street and on both sides thereof, in order to narrow the streets. It was never contemplated that they should have power to grant an encroachment which would jut out eighty feet into the street and be an obstruction thereon. Such a grant as this was not an encroachment, but a dedication of the major part of the street for purposes entirely foreign to the object for which the street was laid out. And to allow the erection of a building eighty feet wide and four hundred and eighty feet long in the street, for a passenger and freight depot, would be an obstruction instead of the encroachment contemplated by the act of 1857. It would obstruct nearly two thirds of the width of the street, and would be a nuisance. "The king cannot license the erection or commission of a nuisance; nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building or other structure of like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of the place cannot give a valid permission thus to occupy

streets without express power to this end conferred upon them by charter or statute": Dillon on Municipal Corporations, sec. 660. The power given by the legislature is "to permit and sanction encroachments for a reasonable compensation in money, to be paid into the city treasury": Acts 1857, p. 182.

2. If the mayor and council make a donation of ten acres of land to a railroad corporation, and afterwards the railroad corporation returns the land to the city on condition that large encroachments upon its streets shall be granted to the corporation, is that a compliance with the act of 1857, under which the authority is given to "permit and sanction encroachments for a fair and reasonable compensation in money paid into the city treasury"? Did the legislature intend, when it passed this act, to give the mayor and council power to deal in real estate by exchanging a portion of its streets for swamp-land? Can the intention of the legislature, when it says "a fair and reasonable compensation in money," be circumvented by first giving away land on the common, and receiving it back in exchange for a portion of its streets? We think not.

3. Even if the mayor and council had the power to grant encroachments, we do not think that in this case they had due regard to the interest of property holders who were affected by their action, as required by the act of 1857. This grant of eighty by four hundred and eighty feet not only affected the interests of property holders on the same side of the street, but of property holders on the opposite side, and affected their interest in such a way as that it would be almost impossible to arrive at a just compensation in damages to such owners. Where the encroachment is granted, it destroys the symmetry of the street and the continuity of the sidewalk. Persons owning stores and doing business upon that side of the street next to the encroachment would be deprived of all transient custom on the southwest end of the encroachment. The granting of the encroachment would further debar property holders on the opposite side from obtaining any encroachment whatever, because an additional encroachment would virtually close the street. It therefore seems to us that the mayor and council, instead of having due regard to the property holders, showed an absolute disregard of their rights in making this grant.

Counsel for the city and the railroad company relied in the argument upon the case of *Kirtland v. Mayor etc. of Macon*, 66 Ga. 385. A careful reading of that case will show that it is

not in conflict with the view herein laid down. In that case, a small encroachment had been granted by the mayor and council twenty-five years before, and had been occupied by the parties on both sides of the street for that length of time, Kirtland enjoying this privilege equally with the other parties. The encroachment was small, as we have said, and had been given parties on both sides of the street. Strohecker undertook to build a house upon this encroachment, and Kirtland filed a bill undertaking to enjoin him, not because the mayor and council had no power to grant the encroachment, nor because the encroachment had been granted illegally, but on account of the obstruction of his view. The court denied the injunction, and he afterwards amended his bill, and asked for damages for the obstruction to his view; and that was really the case decided in 66 Georgia, *supra*. The street, which had existed in that condition for twenty-five years, and which the public for that length of time had acquiesced in and accepted as the true street, was not in the slightest interfered with. The facts in this case are very different from the facts in that. Instead of a few feet being given, as in that case, here we have the donation of nearly two thirds of the street to build a freight depot. Instead of authorizing building upon what had been an inclosure for a quarter of a century, it is proposed to build upon an open and busy thoroughfare. The building is not to go on inclosures acquiesced in by property holders on both sides of the street for years, but in the middle of the street, in front of the complainant's property, to the damage of the complainant, and over the protest of all parties interested.

4. Taking this view of the case, it is unnecessary for us to pass upon the legality of the action of the city council, more than to say that it is improper and illegal for any member of a city council to vote upon any question brought before the council in which he is personally interested.

This disposes of the bill of exceptions of the mayor and council and the railroad company. Daly excepted because the chancellor refused to enjoin the railroad company from laying its tracks on and along Fifth Street.

5. There are some conflicting decisions in the earlier reports upon this subject; but we think the rule is now well settled that a railroad company using steam motors cannot lay its track longitudinally upon the streets of a town or city without the sanction of the legislature of the state. Judge Dillon, in

his admirable work on municipal corporations (vol. 2, sec. 724), in summing up his conclusion upon this subject, "after an examination of all the reported cases upon the subject of railways in streets," says: "As respects ordinary railways operated by steam, and street railways operated by horses, legislative authority is necessary to warrant them to be placed in streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner and whose trains are propelled by steam." See also the numerous authorities cited by him upon this subject; also 2 Wood on Railway Law, sec. 273; *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271, decided by this court at October term, 1886; *Eichels v. Evansville Street R'y Co.*, 78 Ind. 261; 41 Am. Rep. 561.

6. It becomes necessary, then, for us to inquire whether the legislature has granted this power to the mayor and council of Macon, or has granted this right to the railroad company. Learned counsel for the city and for the railroad contended that the general clause in the charter of the city, giving it the power to control the streets, was sufficient to authorize them to grant this privilege to the railroad. We have just seen, from the above-quoted authority, that this is not sufficient. It must be an express power granted to the city, or one which arises from necessary implication. It is held by Judge Dillon—and he is sustained by the authorities—that the general powers given in charters to corporate authorities are not sufficient to authorize them to grant this privilege.

7. Counsel further contended that this power was granted in the charter of the railroad company: 1. That the charter authorized the company to build a railroad from Macon to Homersville; 2. That it granted to this company all the rights and privileges of the Central Railroad and Banking Company. They claimed that one of the rights and privileges granted to the Central Railroad and Banking Company, by the act of 1850, was to enter the city of Macon. We have carefully read these charters relied on by the learned counsel, and can find nothing contained in them granting, either expressly or by implication, the right to lay their tracks longitudinally in the streets. Counsel relied upon the case of

Hazelhurst v. Fresman, 52 Ga. 244, where this court held that the Macon and Brunswick railroad, under its charter and amendments thereto, authorizing it to construct a railroad from the city of Brunswick to the city of Macon, and clothing it with the rights, privileges, and immunities of the Central railroad, was authorized to construct its road into the city of Macon, and was not limited to the city lines; and that a private citizen could not enjoin it from appropriating ground for the location of its track because of its want of authority to come within the city lines. We do not doubt the correctness of that decision, nor do we doubt the right of this railroad company, under its charter, to enter the city of Macon; but we hold that when it does enter, it must enter according to law. It must buy or condemn its right of way like individuals or other corporations, or it must have the authority of the legislature before it can appropriate streets of the city which have been set apart by the city for the use of the public. The fee to the streets of the city of Macon is in the state. It is therefore eminently proper that the right to use them for any other than the ordinary use of streets should proceed from the legislature: *District of Columbia v. Baltimore etc. R. R.*, 114 U. S. 461. The court, in the case of *Hazelhurst v. Freeman*, *supra*, does not decide that the Macon and Brunswick railroad had a right to use the streets of the city in order to go within the city lines; but it simply decided that the company had a right to go within the city lines and to appropriate property under its charter for the purpose of getting in, and that the court below erred in holding that the railroad company could not appropriate property within the lines under its charter.

8. The legislature not having specifically granted this right to the Georgia Southern and Florida Railroad Company, in its charter, to occupy the streets of the city of Macon with its tracks and engines, did it grant the right to the railroad company by giving it all the rights and privileges that the Central railroad had? Counsel for the railroad company contended that, under the act of 1850, authorizing the Central, Macon and Western, and Southwestern railroads to erect a depot in the city of Macon, the right to lay the tracks and run the engines over the streets is thereby given to this railroad company. We do not agree with them in this contention. We have carefully read this act, and we cannot find therein any right or privilege granted to the Central Railroad and Banking Company to occupy and use any of the streets in the city

of Macon for their tracks and engines. On the contrary, the act of February 11, 1850, expressly provides that they shall pay to the owners of property through which they may pass for whatever damages they may do to their premises, as provided for by the respective charters of the aforesaid companies: Acts 1849-50, 249. It seems to us that if the legislature had intended to put a new burden or use upon the streets of the city, they would certainly have said so in the act. We are strengthened in this view by the legislative history of the state in regard to street railroads and steam railroads entering the towns and cities thereof. We have examined numerous acts of the legislature in former years, and in all of the acts we have found granting charters to street railroads, operated by horses, or ordinary railroads operated by steam, where they enter the streets of a city, the right to lay down their tracks in the streets is expressly granted. So far as we know, not even a horse-car company has ever attempted to lay its tracks upon the streets of a city in this state without legislative sanction. The law being that a municipal corporation has no power to authorize a railroad company to lay its tracks and use its engines in the streets of the city without such legislative sanction, and there being no legislative grant to authorize the laying of the tracks of this company in the streets of the city of Macon, it follows that the chancellor erred in refusing to enjoin the railroad company from laying its track as complained of in this case. Entertaining these views, we deem it unnecessary to discuss the question of damages, which was so ably and elaborately argued by counsel on both sides.

The judgment as to the bill of exceptions of Daly is reversed; and the judgment granting the injunction as against the encroachments is affirmed.

MUNICIPAL CORPORATIONS — POWERS. — Any fair, reasonable doubt concerning the existence of power in a municipal corporation is resolved against it, and the power denied: *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370, and note 375.

POWER OF STATE, OR OF MUNICIPALITY AS AGENT OF STATE, TO AUTHORIZE use of street by railroad: *Fulton v. Railway Transfer Co.*, 85 Ky. 640; 7 Am. St. Rep. 619, and note 627; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and note 726. The use by a railroad company of a public street for a terminal yard, without compensation to the adjoining land-owners, and thereby causing a nuisance to neighboring dwellings, may be restrained by injunction, although such use is authorized by the legislature, and is necessary to the business: *Pennsylvania R'y Co. v. Angel*, 41 N. J. Eq. 316; 56

Am. Rep. 1, and see note 6-16; compare *Des Moines St. Ry Co. v. Des Moines etc. St. R. R. Co.*, 74 Iowa, 585.

CORPORATIONS. — Directors are disqualified from voting upon matters and questions in which they are personally interested: *Smith v. Los Angeles etc. Ass'n*, 78 Cal. 289; *ante*, p. 53, and note. Where the majority of the city councilmen were stockholders in a water company with which the city makes a contract through such councilmen, the contract is void, and no liability attaches to the city thereunder: *Borough of Milford v. Milford Water Co.*, 124 Pa. St. 610.

MUNICIPAL CORPORATIONS — POWERS OF. — Municipal corporations, empowered by their charters or otherwise to do so, may authorize a railway company to make use of their streets: *Railroad v. Bingham*, 87 Tenn. 322, and cases therein cited and approved. Municipal corporations possess only such powers as are expressly granted by statute to them, or such powers as are necessarily implied therefrom: *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118.

JOHNSON v. COCHRAN.

[81 GEORGIA, 39.]

ESTOPPEL — ARBITRATION AND AWARD. — Where the name of a person is signed to a submission to arbitration, though he did not in fact sign it, but was present when the arbitration was had and the award made, and testified before the arbitrators, knowing that his rights were involved in the controversy, he is estopped from denying the correctness of the award, and a verdict to the contrary will be set aside and a new trial granted, where the court ignored the question of estoppel and did not charge the jury upon it.

W. J. Iverson and J. A. Hunt, for the plaintiff in error.

Stewart and Daniel, and E. F. Dupree, contra.

BLANDFORD, J. The question in this case is, whether the verdict of the jury was sustained by the evidence. There are some special grounds in the motion for a new trial which are not approved by the court, and we cannot consider them. It appears that Johnson rented certain lands to F. A. Cochran, the father of R. E. B. Cochran, the defendant in error, and of T. J. Cochran. A controversy having arisen between the Cochrans and Johnson, it was left to arbitration. The question left to the arbitrators to decide was, whether Johnson had rented the land to the father, F. A. Cochran, or to the two sons, R. E. B. and T. J. Cochran. The names of all the Cochrans, both the father and the sons, were signed to the submission to arbitration. The arbitrators decided and awarded that Johnson had rented the land to the father, and not to the sons. R. E. B. Cochran, the defendant in

error here, after this award had been rendered, brought his action against Johnson to recover from Johnson for certain work which he alleged he had done on this land, and for certain corn he had advanced to Johnson, and one fourth of the value of seven bales of cotton which had been raised upon the land by Cochran, and which had been sold by Johnson and the money therefor collected and retained by him. A verdict was had for R. E. B. Cochran for \$52.50 principal, besides interest.

R. E. B. Cochran testified that he had never signed the submission, but that he was present when the arbitration was had and the award was made; and that he had testified as a witness before the arbitrators, and knew that his rights were involved in that controversy. We think he is estopped, under the circumstances, from denying the correctness of that award. The court below seems to have ignored this question entirely, and the jury were not charged on this subject at all. No instruction was given them as to whether he was bound by the award, under the circumstances of the case, or not. We think he was bound by it; and that award having settled the fact that Johnson had rented this land to the father, the verdict of the jury was without evidence to support it, and the court erred in not granting a new trial.

Judgment reversed.

ESTOPPEL. — What constitutes and what are the essentials of estoppel: See *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17, and note 22, 23; *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307, and note; *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and note 597; *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, and note 53; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; *Montgomery v. Keppel*, 75 Cal. 128; 7 Am. St. Rep. 125; *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23, and note 28; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note 304; *New York R'y Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note 826; *Humphreys v. Finch*, 97 N. C. 303; 2 Am. St. Rep. 293, and note 296; *Gunther v. New Orleans etc. Ass'n*, 40 La. Ann. 776; 8 Am. St. Rep. 554, and note 559; *Hafter v. Strange*, 65 Miss. 323; 7 Am. St. Rep. 659, and note 662; *Guest v. Burlington O. H. Co.*, 74 Iowa, 457.

KEITH v. WALKER IRON AND COAL COMPANY.

[81 GEORGIA, 42.]

A CORPORATION BUILDING A STRUCTURE composed in part of brick-work and in part of wood-work is not responsible for the fall of the masonry upon the carpenter, whereby he was killed, if due care was exercised in selecting the mason, and if there was no reason why he should not be fully trusted as an expert in his business, though his work proved defective, and the carpenter thereby lost his life; the two workmen being co-employees of a common master and co-operating in their respective departments of labor to a common end, to wit, the erection and completion of the contemplated structure.

Lumpkin and Brock, McCutchen and Shumate, and Graham and Graham, for the plaintiff.

W. U. and J. P. Jacoway, and R. J. McCamy, for the defendant.

BLECKLEY, C. J. The company, a corporation, desiring to build a magazine to contain its ammunition for use in blasting, had in its employment a force of carpenters and also a brick-mason. The mason built an arch for this structure; and, after the arch was completed, he was consulted by the carpenters, through their foreman, to ascertain whether it was safe to remove the props that supported the arch temporarily. He pronounced it safe, and the props were removed. While they were engaged in the removal, the arch fell, and one of the carpenters was killed. The widow of the deceased carpenter brought this action to recover damages; and upon the trial, the court granted a nonsuit. The question is, whether the evidence made a *prima facie* case of negligence against the corporation, — negligence in the performance of its legal duties to the deceased carpenter. It is certain that to take the mason's opinion of the safety of the arch was the best means that the corporation had of deciding upon its safety. The mason was reputed to be of the first class, and he was paid by the corporation first-class wages. In the evidence there is no indication of negligence on the part of the corporation in selecting him. He was a proper man to intrust with the execution of the work and with the decision of its safety. The evidence shows that he made a mistake in his opinion touching its safety. The arch proved to be unsafe, but the indications are, that it was simply a mistake in judgment on the part of a competent expert in the formation of his opinion. We do not see that this corporation omitted any duty to the

carpenter which the law bound it to perform. It was better to take the mason's opinion than that of any other agent, officer, or employee of the corporation. His opinion proved to be erroneous; but the corporation was no absolute insurer to its carpenter against accidents resulting from defective work performed by its mason. All the corporation could do was to exercise reasonable and ordinary care in the selection of a competent mason. And the persons interested, including the master-carpenter and the deceased himself, thought that it was safe to go under this arch at the time the casualty occurred. This action could not be maintained on the evidence adduced by the plaintiff, and the judgment of the court granting the nonsuit was correct. The head-note is a part of this opinion.

Judgment affirmed.

FELLOW-SERVANTS — WHO ARE AND WHO ARE NOT FELLOW-SERVANTS: See *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and cases cited in note 569, 570.

MASTER'S LIABILITY FOR INJURIES TO HIS SERVANT BY A CO-SERVANT'S NEGLIGENCE: See *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and note 570.

COOK v. PINKERTON.

[81 GEORGIA, 89.]

A HORSE SWAP IS COMPLETE WHEN THE TERMS OF EXCHANGE HAVE BEEN FINALLY SETTLED, and each party has relinquished possession of one of the animals and acquired possession of the other. For one of the parties afterwards, without consent of the other, to resume possession of his former property, is simply a tort, and does not reinvest him with title.

A SALE AND DELIVERY TO A THIRD PERSON AFTER SUCH WRONGFUL RESUMPTION OF POSSESSION will confer no title on the purchaser.

IN AN ACTION BY THE OWNER AGAINST THE PURCHASER, conversations and declarations which were a part of the *res gestæ* of the swap and its incidents, or of the subsequent tort, are admissible in evidence, to show how the plaintiff acquired title and possession, and how he lost possession without parting with title.

Dessau and Bartlett, for the plaintiff in error.

S. A. Reid, and Hardeman and Davis, contra.

BLECKLEY, C. J. The action being one of trover to recover for a horse, the question was which party had acquired Pope's title, or rather, whether Pinkerton, who was the plaintiff below, had obtained it or failed in obtaining it. The facts were, that

Davis, a stable-keeper, was Pinkerton's agent, and as such had control of a mule which was hired to Solomon. Pope, owning a sorrel horse, it was agreed between him and Davis that the horse was to be exchanged for the mule. Davis selected a negro, whose name was Perry, and Pope employed the negro to go after the mule. The negro took the horse, Pope telling him that it was Pinkerton's horse, to the wagon where the mule was at work, detached the mule from the wagon, hitched the horse in his place, and brought the mule to Pope. Pope made two efforts to sell the mule, but failing to do so, he directed Perry to take the mule back and bring him the horse, and so Perry did. Perry carried the mule back to the wagon, obtained the horse, and carried the horse to Pope. Who was in charge of the wagon does not appear, but it may be inferred that it was Solomon, the person who had the mule hired. Some days afterwards the mule was carried to the stable of Davis, and was there kept by Davis as Pope's mule for some two months. What finally became of it does not appear, but it does appear that Pinkerton never had any more to do with it. The evidence indicates that after this transaction was complete in all its parts as to the exchange of the mule for the horse, and the unauthorized return of the horse to Pope, he sold the horse to Cook. The decided indication is, that as between the title of Pinkerton and the title of Cook, Pinkerton's was the senior, and we think there is evidence enough to show that Pinkerton acquired title; that the exchange of these animals by the parties was complete; and that if this action had been brought against Pope, there would have been no difficulty in a recovery. Then, if there could have been a recovery against Pope, we see no reason why there should not be against Cook, who could derive no better title from Pope than Pope had at the time of the sale.

Evidence was admitted of what Pope said to the plaintiff, and what he said to Davis, and what he said to Perry. Pope's declarations were admissible as a part of the *res gestæ*, all of them being made while the transaction by which he parted with the title to the horse to Pinkerton was in progress, or else while the means by which he resumed possession of the horse were in progress. So that the declarations can all be referred to the *res gestæ*, either of the contract of exchange between Pope and Pinkerton, or of the wrong done by Pope in resuming possession of the horse. There was no error committed by the court in receiving them in evidence.

The result is, that the judgment denying a new trial is affirmed. The head-notes are to be read as a part of this opinion.

Judgment affirmed.

EVIDENCE — RES GESTÆ. — As to what declarations do and what do not constitute *res gestæ*, see *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and note 900; *Leahy v. Cass Ave. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and note 306; *Missouri P. R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758.

PERSONALTY — SALES OF. — A purchaser for value ordinarily takes no better title than that of the vendor: *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303; *Burton v. Curryea*, 40 Ill. 320; 89 Am. Dec. 350; and title to personality cannot be acquired from one who has no title: *Carmichael v. Buck*, 10 Rich. 332; 70 Am. Dec. 226; *Wilson v. Crocket*, 43 Mo. 216; 97 Am. Dec. 389; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *McMahon v. Sloan*, 12 Pa. St. 229; 51 Am. Dec. 601; *Wheelwright v. Depeyster*, 2 Johns. 471; 3 Am. Dec. 345; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note.

VAN WINKLE & Co. v. WILKINS.

[81 GEORGIA, 98.]

MEASURE OF DAMAGES FOR FURNISHING DEFECTIVE MACHINERY, under a contract to supply first-class machinery, is the difference between the contract price and the actual value of the machinery supplied.

MEASURE OF DAMAGES FOR DETERIORATION IN VALUE OF COTTON SEED, caused by delay in furnishing and setting up machinery according to contract for grinding the seed, is the value of the seed before being damaged by delay and their value in their damaged condition.

DAMAGES ARISING FROM BREACH OF CONTRACT contemplated by the parties at the time the contract was made is not too remote to be recovered, but may be the subject-matter of recoupment.

DAMAGES — BREACH OF CONTRACT — TIME — EVIDENCE. — In an action for damages for breach of contract to furnish machinery by a certain time, parol evidence is admissible to show whether time was of the essence of the contract, and whether the damages claimed were in the contemplation of the parties at the time that the contract was executed.

POWER OF PARTNER TO BIND FIRM BY CONTRACT. — A partner, being competent to bind his firm by contract touching its business, is also competent to make time of the essence of such contract without special delegation of power to him by his copartners.

CONTRACT TO FURNISH FIRST-CLASS MACHINERY of a certain kind means such as corresponds with the best of that kind in general use, and not merely the best kind of a particular manufacture, unless the two superlatives coincide.

DAMAGES — BREACH OF CONTRACT TO FURNISH MACHINERY — WAIVER OF DEFECTS. — Under a contract to supply certain machinery by a certain time, the purchaser has a right to rely upon its being as contracted for, until it is proved otherwise, and to rely upon the warranty of the manu-

facturer; and receiving the machinery after the time specified is neither a waiver of defects therein, nor of damages resulting from its non-delivery in due time.

DAMAGES — BREACH OF CONTRACT — RIGHT OF ACTION. — Under a contract to furnish first-class machinery within a certain time, a sale or transfer by the original purchasers will not protect their vendor from duly accounting to them upon a covenant or warranty connected with the purchase of the machinery. In such case, the first purchaser is not divested of his right of defense as against the purchase-money, nor the last purchaser invested with any right against the first vendor.

EVIDENCE. — **WITNESS WHO IS PARTY** to a suit may be asked in a general way touching the issues and facts involved.

NEW TRIAL. — **REJECTION OF SOME ADMISSIBLE EVIDENCE** is not necessarily ground for a new trial.

DAMAGES — VERDICT — INTEREST. — Where a verdict is for a certain amount with interest, no time being specified from which interest is to be computed, it should be counted from the time of maturity of the written contract declared upon, when the amount found is less than the last installment of the purchase price due on such contract.

Frank H. Miller and P. P. Johnston, for the plaintiffs.

Foster and Lamar, J. J. Jones, and R. O. Lovett, for the defendants.

BLECKLEY, C. J. 1. In defense to an action upon a contract to manufacture machinery for a cotton-seed oil mill, a deduction from the contract price was claimed on two grounds: 1. That the machinery was not first-class, the contract being to supply machinery of that class; and 2. That a delay of some days occurred in completing the work, in consequence of which loss occurred from the decay or deterioration of cotton-seed that had been purchased for use in the mill. The court, in ruling upon the pleas and in charging the jury, recognized both elements of defense, and, we think, correctly.

2. The principle, as to measure of damages, laid down with reference to deduction from the agreed price on account of defective machinery was the difference between the contract price and the actual value of the machinery supplied; and in reference to the cotton-seed, the measure of damages recognized in the charge of the court was the difference between the value of the seed before they were damaged by delay and their value in their damaged condition. We approve these measurements.

3. It was contended that the damage from the spoiled cotton-seed was too remote and uncertain; but we think not, as the court restricted the jury to the damage contemplated by the parties in the contract. If the damage was not such

as was within the contemplation of the parties, it was not matter for recoupment, but if it was within the contemplation of the parties at the time the contract was made, it was the subject-matter of recoupment.

4. Parol evidence, we think, was admissible to show whether such damage was in the contemplation of the parties. The contract named a time for the machinery to be ready to be put up, and the parol evidence simply went to illustrate the question of whether that time was of the essence of the contract, and whether the purchase of cotton-seed in advance and therefore the damage which resulted from supplying a stock of seed and keeping it on hand with a view to having it ready to run the machinery when the time arrived, was within the contemplation of the parties. There was no error in the controlling principles applied by the court in the trial of the case.

5. Van Winkle represented the firm of which he was a member in agreeing to the terms and stipulations of the contract. That he was competent as a partner to contract in behalf of the firm touching its business is not controverted, but it is said that he could not, without some special delegation of power to him by his copartners, render time of the essence of any contract, and bind the firm to abide the legal consequences of so doing. We see no virtue in this position, except that of bold and courageous novelty.

6. When a manufacturer contracts to supply a first-class article, there is no reason for understanding him as stipulating with reference to his own productions, and them only, as a criterion. Why should he be allowed to make the standard and the article both, unless for so doing he provides expressly in his contract? A first-class cotton-seed oil mill and a first-class Van Winkle cotton-seed oil mill might be very different articles, and very different in value. First-class machinery of a given kind is such as corresponds with the best of the kind in general use, not merely with the best of a single manufacturer; unless, indeed, the two superlatives coincide, in which case to realize one would be to realize the other also.

7. It was urged in argument that receiving the machinery was a waiver both of its defects and of damages resulting from its non-delivery in due time. Why so? After expensive preparations to have and use a mill, it was probably much better to have one of inferior quality than none at all. Besides, it was perhaps only by trial that the defects were discoverable

by the purchasers. Indeed, the evidence appears to so indicate. Under the circumstances, there was no obligation to return the machinery or to offer to return it. The purchasers had a right to rely upon its being first class until it proved to be otherwise, and then they had a right to stand upon the warranty of the manufacturer, instead of rescinding or offering to rescind the contract of purchase.

As to the damages resulting from delay, these had already been sustained when the mill was received; its reception, in so far as it affected them at all, could only hinder more from accruing; it certainly could not increase them. There was no inconsistency between reception of the machinery and retention of the claim for damages on account of delay to furnish it by the time stipulated. To hold that there was a waiver by implication would be very unreasonable.

It was also urged that the purchasers lost the right to go upon the manufacturers for charges or reduction of price in consequence of the machinery being inferior, because it appeared, or could be made to appear by evidence, had the evidence not been improperly rejected, that the mill was not in fact used by the purchasers, but was sold or transferred to a corporation created to run it. We are unable to see how any sale or transfer made by the original purchasers would protect their vendors from duly accounting to them upon any covenant or warranty connected with that purchase. Such covenant or warranty would not pass with the machinery to the corporation or second purchaser, so as to shift the right of action to the new party. No principle is in sight which would either divest the first purchasers of their right of defense as against the purchase-money, or invest the new party with any right whatever as against the manufacturers or first vendors.

8. It was complained that general questions to a witness on the stand who was one of the parties were not proper questions; that he ought to have been interrogated specifically, and not in a general way. We think there is no rule that requires a party, when a witness, to be examined differently from other witnesses, and that to ask him to state the facts and let him state them is a proper mode of examination. If anything comes out in the course of his statement that is not admissible evidence, it can be objected to, and in this case might have been objected to. There was probably some of the witness's evidence that was objectionable; but it was not objected to. The mode of question was the point of objection, and we think

the ruling of the court was correct. Section 3879 of the code, as to examination by written interrogatories, does not apply when the witness is under examination orally in open court.

9. It was complained that some evidence was rejected; and we think some of it was probably admissible, but its rejection would not be cause for a new trial, under the view we take of the case.

10. The verdict was for so much with interest, no time being specified from which interest was to be computed. For this reason, the verdict is alleged to be wanting in sufficient certainty. We think, as the principal found was less than the last installment of the price, the legal import of the verdict is that interest is to be counted from the maturity of that installment. And the time of maturity is fixed by the written contract declared upon. *Id certum est quod certum reddi potest.*

The court did not err in denying the motion for a new trial. Judgment affirmed.

DAMAGES — MEASURE OF, FOR A BREACH OF CONTRACT: See extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778 et seq. As to the measure of damages for which carriers are liable by reason of delay in delivering freight under their contracts of carriage, see *Savannah etc. R'y Co. v. Pritchard*, 77 Ga. 412; 4 Am. St. Rep. 92, and note 96; *Ayers v. Chicago etc. R'y Co.*, 71 Wis. 372; 5 Am. St. Rep. 226, and note 233. No action will lie for mere speculative or remote damages by reason of a breach of a contract: *Bridges v. Lanham*, 14 Neb. 369; 45 Am. Rep. 121; *Fitzsimmons v. Chapman*, 37 Mich. 139; 26 Am. Rep. 508; *Coweta etc. Co. v. Rogers*, 19 Ga. 416; 65 Am. Dec. 602; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Cooke v. England*, 27 Md. 14; 92 Am. Dec. 618; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Worcester v. Great Falls Mfg. Co.*, 41 Me. 159; 66 Am. Dec. 217; *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313; *Blanchard v. Eby*, 21 Wend. 342; 34 Am. Dec. 250; *Hewlett v. O., N. O., & T. R. R. Co.*, 65 Miss. 463; *Weller v. Oregon etc. R'y & Nav. Co.*, 15 Or. 153; *San Antonio v. Strumberg*, 70 Tex. 379; *Stern v. Rosenheim*, 67 Md. 503; but a loss of profits, which may have resulted from a fulfillment of the contract, may be compensated for in damages: *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Simmons v. Brown*, 5 R. I. 299; 73 Am. Dec. 66; *Hoy v. Grenoble*, 34 Pa. St. 9; 75 Am. Dec. 628; *Adams Ex. Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382.

DAMAGES. — Loss and profits arising out of delays in furnishing machinery under contracts therefor: See *McKinnon v. McKewan*, 48 Mich. 106; 42 Am. Rep. 459, and particularly note 461-465. Loss of profits as an element of damages: See extended note to *Griffin v. Colver*, 67 Am. Dec. 724-727; note to *Sitton v. McDonald*, 60 Am. Rep. 488-496. Proximate cause of damages for which a recovery may be had: See note to *Lehigh etc. R. R. Co. v. McKeen*, 35 Id. 649-651; note to *White v. Conley*, 52 Id. 157-166; note to *Campbell v. City of Stillwater*, 50 Id. 569-574; note to *Heney v. Dennis*, 47 Id. 381-387; note to *Brown v. Chicago etc. R'y Co.*, 41 Id. 53-58; note to *Forney v. Goldmacher*, 42 Id. 390-393.

DAMAGES FOR BREACH OF CONTRACT — RECENT CASES. — Where time is not of the essence of the contract, no damages are recoverable for delay in fulfilling the terms of such contract, where proof shows that the contract was completed as soon as plaintiff needed it: *Brakine v. Johnson*, 23 Neb. 261. Where goods are sold for a special purpose, and vendor has notice that a failure to deliver them according to contract will occasion special damages by suspension of work, he is liable for all damages naturally resulting from such suspension so caused: *Vickery v. McCormick*, 117 Ind. 594. The measure of damage for failure to deliver personalty as per contract is the difference between the sale price and the market price at the time of actual delivery: *Smith v. Snyder*, 82 Va. 614. Measure of damages for failure to keep a ditch in repair is the money actually paid out to keep such ditch in repair, which was rendered necessary by defendant's failure to keep it in repair: *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60. When a person undertakes any duty or trust, the law presumes that he contracts to use skill, integrity, and diligence, and failing in any of these, such a one is guilty of a breach of contract: *Hart v. Barnes*, 24 Neb. 782. And in a suit for breach of contract for manufacture of a machine for agricultural purposes, the manufacturer having been informed that such machine was to be used in Louisiana, plaintiff may prove the market price of such machine in Louisiana as an element of damages: *Alabama Iron Works v. Hurley*, 86 Ala. 217.

PARTNERSHIP — POWER OF ONE PARTNER TO BIND FIRM. — *During the Existence of the Partnership.* — For a general discussion of the law on this subject, see Lawson's Rights and Remedies, secs. 645, 646. One partner is a general agent for his firm within the scope of partnership business: *Deakin v. Underwood*, 37 Minn. 98; 5 Am. St. Rep. 827; *London Savings F. Society v. Savings Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Barker v. Mann*, 5 Bush, 672; 96 Am. Dec. 373. But one partner has no authority to make a general assignment for the benefit of creditors: *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227, and note 231. And where a firm bought and paid for property, and the vendor deposited the money received from the firm with one of the partners, to be held till the firm should be satisfied as to the title, the rest of the firm, not knowing of such deposit, were not responsible for it, although the purpose of the partner receiving it was to hold it as an indemnity for the firm's benefit: *Battle v. Street*, 85 Tenn. 282; compare *Perth Amboy Terra Cotta Co. v. Wood*, 124 Pa. St. 367. Nor is one partner bound by a sealed instrument executed by his copartner in the firm name, unless a subsequent ratification or special authority to do so is shown: *Sibley v. Young*, 26 S. C. 415. So one of two copartners who executed a mortgage cannot, without the other's consent, authorize the mortgagee to vary the terms of sale prescribed therein: *Arnold v. Green*, 15 R. I. 348. But one member of a firm can mortgage the personalty of the firm to secure the payment of partnership debts without the knowledge or consent of other members of his firm: *Hembree v. Blackburn*, 16 Or. 153. And one partner can bind his firm by a promissory note given for merchandise for such firm: *Little Grocer Co. v. Johnson*, 50 Ark. 62. For partner's power to bind his firm as sureties, see extended note to *New York etc. Ins. Co. v. Bennett*, 13 Am. Dec. 115-118. As to sales of firm property by one partner, see extended note to *Schmidlapp v. Currie*, 30 Am. Rep. 533-537.

After Dissolution of Partnership: See Lawson's Rights and Remedies, secs. 676, 677, and cases cited in foot-notes. After dissolution, one partner cannot take a note in his own name, intended for his own use, as a settlement of a claim due the firm: *Lennette v. Starr*, 66 Mich. 539. After dissolution

no partner can create a cause of action against the other partners except by a new authority conferred for that purpose: *Woodson v. Wood*, 84 Va. 478. After dissolution no partner can bind the firm: *Allen v. Logan*, 96 Mo. 591; *Brown v. Watson*, 66 Mich. 233; *Hurst v. Hill*, 8 Md. 309; 63 Am. Dec. 705, and note; *White v. Tudor*, 24 Tex. 639; 76 Am. Dec. 121, and note; and compare *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760. As to a partner's powers after dissolution, generally, see extended note to *Chardon v. Oliphant*, 6 Am. Dec. 574-776; note to *Van Keuren v. Parmelee*, 51 Id. 330-332; note to *Shields v. Fuller*, 65 Id. 295-303.

HARMLESS ERRORS, OR ERRORS WHICH WILL NOT WARRANT A REVERSAL: See *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279, and cases cited in note thereto; *Anderson v. State*, 27 Tex. App. 177; 11 Am. St. Rep. 189, and note.

MATTHEWS v. HUDSON.

[81 GEORGIA, 120.]

WILLS — ESTATES — REMAINDERS. — A devise made by a mother to a trustee for her son in 1854, providing that if the son should die without issue, the trustee was then to sell the property, and equally divide the proceeds, placing the same in the hands of another trustee for the other children of the testatrix, creates a fee in the son determinable only upon his dying without issue, and it was the intent of testatrix that the other children should take by executory devise, and not by contingent remainder, so that no remainder was created by implication in the issue of the son; and neither the latter nor the other children can enjoin the devisee from committing waste on the premises during his lifetime.

BILL to construe a will, enjoin the commission of waste, and for damages. The facts appear from the syllabus and opinion.

R. W. Carswell, and Whigham and Hudson, for the plaintiffs.

Cain and Polhill, for the defendant.

BLECKLEY, C. J. The will does not expressly limit the son's interest, as beneficiary, to his life, nor is anything appointed for the trustee to do except to sell, distribute the proceeds, and pay them over to another trustee in case of the son's death without child or children. No power of sale or management is conferred on the trustee, to be exercised during the life of the son, and the trust was to become active in the one event only, — that is, death, without child or children. The devise, legally speaking, as to the measure of the estate taken by the son, is not materially different from what it would have been if no trustee had been interposed, but the gift made directly to the son, and then to the other children of the testatrix on the contingency mentioned. The trust has

no significance in measuring the estate, but is virtually a power of sale, etc., exercisable alone on the given contingency. In case of death with children, the trustee will have as little to do after death as before, — that is, nothing whatever. The testatrix appointed a trustee, and invested him with the formal legal title, so that he might appear on the scene for the execution of a specific power if a certain contingency happened. Upon the happening of that contingency, and in that event only, was the fee in behalf of the son to be defeated. The devise was in trust for him, not merely for his use and enjoyment, but the title was put in the trustee for him, without any limit as to time, save on the single condition of death without immediate offspring. Should he die with such offspring, there would be nothing to cut down, reduce, or determine his estate in the property.

The contention is, on the part of the complainants in the bill, that the son took but an estate for life, with remainder to his children, if any; and if none, then the remainder went over to the other children of the testatrix. Estates by implication are not favored, and the supposed remainder in behalf of the son's children rests wholly on implication. The implication in this case is a possible but not a necessary one, for the terms of the will are quite as consistent with an intention on the part of the testatrix to give the absolute fee to her son in case he had children as to give a life estate only with remainder to such children. There was, on her part, no want of confidence in the intelligence, discretion, and virtue of the son, for she not only, in another part of the will, gave to him directly and absolutely slaves and other personalty, but constituted him the trustee for her other children; and it would be to his successor in this trust that his own trustee would have to account for the proceeds of the land in question in case he had to administer it by reason of the son's dying childless.

The beneficiary of the first trust (the son) was appointed trustee to take and hold the testatrix's bounty to the beneficiaries of the second trust, her other children. Whilst she constituted another trustee for him as to this land, she constituted him trustee for her other children as to what she gave them out of her estate, including, according to the letter of the will, their contingent interest in the proceeds of this land; but, of course, as he would be dead before this interest could vest, if it ever vested, she did not expect him, but his

successor, to receive the proceeds of the land from the son's trustee, in case the executory devise took effect. Can it be surmised with any degree of probability that a mother who could trust her son, not only to take without restriction slaves and other personalty under her will, but to represent her other children in a fiduciary capacity, intended not to trust him to provide for his own children in his own way, if he should have children? And this is the very hinge of the case. Did she trust him to provide for them, or did she intend to provide for them herself by an implied limitation of his interest in this land to an estate for his own life, and by an implied remainder in fee to them after his death? If provision for his children was her purpose, there is a strong probability that she would have expressed it, and not left it to implication. It is plain that she was not swayed by a desire to keep this particular land in the family; she did not devise it specifically to her other children on the contemplated contingency, but directed a sale of it, and a division of the proceeds. Had she intended it or its proceeds to go, by way of remainder, to her son's children, would she not also have directed a sale and division in their behalf, or else have said that the land itself, and not its proceeds, was to be theirs? Mark that the devise over is not of the land, but of the proceeds of its sale; the identical property given to the son is never to reach the other children of the testatrix or their trustee, but only the money which it brings when sold. If there is a remainder created for the son's children, it is in the land, and if a remainder over, it is in a different thing, the fund produced by a sale of the land.

Independently of the special features of this will to which we have called attention, there are several cases in our reports which tend to show that, on general principles, this devise creates a base or qualified fee, and not an estate for life, with contingent remainders: *Hill v. Alford*, 46 Ga. 247; *Harris v. Smith*, 16 Id. 545; *Gibson v. Hardaway*, 68 Id. 370; *Groce v. Rittenberry*, 14 Id. 232.

Though not read or cited in the argument, our attention has since been called to *Wetter v. United Hydraulic Co.*, 75 Ga. 540, a case which, at first view, seems directly in point, and the devise construed is apparently, in some respects, stronger for a base fee than the one now under consideration, yet the court held that only a life estate was created in the first taker, and that the subsequent limitation implied a con-

tingent remainder in favor of children, with remainder over in the event that failed. But the will involved in that case was made in 1839, when the old law prevailed both as to marital rights and sole inheritance by the husband, and the legatee, then an infant, was the daughter of the testatrix, and, by the will, took the whole of her estate, real, personal, and mixed. She afterwards married, and died leaving children, who claimed the property in controversy, under the will, as devisees in remainder. By that will, the infant daughter, on attaining majority, was then to become the absolute owner of all the mother's estate, to have and hold the same, "and her heirs forever."

Custody and control of the estate were in the mean time given to the executors for her use and benefit. If she died leaving no issue or lineal heirs, the whole estate was to go and belong to the mother and sister of testatrix, as tenants in common, and their heirs forever; and should the daughter survive them and die without issue "as aforesaid" then living, the whole estate was to vest in the next of kin of testatrix then living, and their heirs forever. The executors were authorized to assume and exercise the necessary and lawful trust "herein prescribed" as to custody of the estate, and at their discretion to sell the same, or any part, to vest the proceeds in stocks, and to transfer the same to the daughter at majority, or to the mother and sister, or other heirs after the daughter's death without issue or lineal heirs then living. Such was that will, and that it presents a very powerful case in favor of an estate in fee, defeasible on the contingency of death without leaving children, cannot be doubted or denied. I need not pass in review the reasons which the court gave for deciding otherwise, but those which present themselves to my own mind are briefly these: The legatee was an infant, and whether she would have capacity to provide by marriage contract, discreetly or judiciously for her offspring, or even for herself, the testatrix did not and could not know. If she failed so to provide, her fortune, both as to her and her children, would be at the mercy of her husband, who by reducing it to possession would own it all. Should he not do this, he would, in case of her death during the coverture, be her sole heir at law, and as such take it all, unless she died testate, which could not happen without his consent. In the face of these legal possibilities, it would be rational, if not necessary, to imply a remainder in behalf of the daughter's children. None of the reasons here indicated

are operative in the present case, in which a son and not a daughter was the immediate object of the mother's bounty. Though his age is not disclosed by the bill (and on the bill alone was the judgment we are reviewing predicated), he had reached years of discretion, and the mother's confidence in his discretion was manifested by appointing him trustee for her other children. His marriage would not result in clothing his wife with his rights of property; he could make a will without her consent, and on his death intestate leaving children, she would not inherit his whole estate, but take only dower or a child's part in realty, and a child's part in personalty. Such, to say nothing of other distinctions, are the differences between the two cases in respect to causes for imputing to the testatrix by mere implication an intention to provide for grandchildren by way of remainder. Certainly, the general rule is that a devise or bequest to a child, though followed by a contingent limitation over, is not to be construed as a direct provision for grandchildren, unless so expressed, but as means to enable the child to provide for his own children in a way suitable to himself. Unless some sufficient reason appears why this latter object alone, or with others, is not to be supposed, it is not sound construction to attribute to the testator an object which he has not declared. Whilst, if *Wetter v. United Hydraulic Co.*, *supra*, is a sound adjudication, there may be some doubt as to the correctness of our ruling, we think the judgment denying the injunction in the present case ought to be affirmed. It is conceded that if Hudson took a fee of any sort, he is exempt from the supervision of chancery in respect to waste, and such undoubtedly is the law. We think he took a qualified fee.

Judgment affirmed.

WILLA. — Construction of the words, "dying without issue": See note to *Stevenson v. Fox*, 11 Am. St. Rep. 924; *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92; *Matter of New York etc. R. R. Co.*, 105 N. Y. 89; 59 Am. Rep. 478; *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 359. Compare *Leathers v. Gray*, 101 N. C. 162; 9 Am. St. Rep. 30, and note; *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note; extended note to *Quackenbos v. Kingsland*, 55 Am. Rep. 774-782.

WILLA. — For recent cases similar to the principal case, in which a similar rule was laid down, see *Fields v. Whitfield*, 101 N. C. 305; *Barney v. Arnold*, 15 R. I. 78; *Vaughn v. Cator*, 85 Tenn. 302; *O'Boyle v. Thomas*, 116 Ind. 243; *Reams v. Spann*, 26 S. C. 561.

WELLS v. HARPER.

[81 GEORGIA, 194.]

EXECUTORS AND ADMINISTRATORS — SALES — REPRESENTATIONS OF TITLE — PURCHASER. — An executor's representations as to the title of land he is about to sell, though made in good faith, fixes no liability upon the estate nor upon himself. He cannot warrant the title, and a purchaser at such sale is bound by the rule *caveat emptor*, and bound for the amount bid.

Lyon and Estes, and J. W. Haygood and F. T. Snead, for the plaintiff in error.

W. H. Fish and E. G. Simmons, contra.

BLANDFORD, J. Harper, who was executor of Drumright, advertised a certain tract of land for sale. Wells applied to Harper to know something about the title, and was informed by Harper that the testator had a good title; whereas it is alleged he did not have a good title, the property having been conveyed to Drumright by a married woman in payment of her husband's debt. The land was brought to sale, and was bid off by Wells. Wells afterwards refused to comply with his bid, and the property was subsequently sold by the executor, and at the second sale did not sell for as much as it did when it was sold to Wells; and this action was brought by the executor against Wells to recover the difference. Wells contended that the executor's representations as to the title, although conceded to have been made in good faith, were a fraud in law, and that therefore he ought not to be compelled to comply with his bid.

We are of the opinion that when one applies to an executor or administrator for information as to the title to land, or as to its quality or quantity, it is the same as if he were to apply to somebody else who had no interest in it whatever. He cannot warrant the title. That being so, the statement of the executor or administrator fixes no liability upon the estate nor upon himself. A purchaser at such a sale purchases with his eyes open. *Caveat emptor* is the rule.

The court below held according to the views we have just expressed, and the judgment is affirmed.

JUDICIAL SALES. — There is no warranty in execution sales: *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note 45. The maxim *caveat emptor* strictly applies to judicial sales: *Redd v. Dyer*, 83 Va. 331; 5 Am. St. Rep. 272, and note 277.

TARVER v. TORRANCE.

[81 GEORGIA, 261.]

EXECUTORS AND ADMINISTRATORS — LIABILITY FOR LOSS BY THEFT. — Where an executor is negligent and does not exercise ordinary care, he is personally liable for the loss of money belonging to the estate, by theft of the same from his person by pickpockets, while traveling upon a street-car in a city.

PLEADING AND PRACTICE — OBJECTION. — Where the record does not disclose the ground of objection to the admissibility of evidence, the question will not be passed upon by the appellate court.

Cain and Polhill, and Evans and Evans, for the plaintiff in error.

Gamble and Hunter, contra.

BLECKLEY, C. J. 1. That the administrator actually lost one thousand dollars in money belonging to the estate, by theft of the same from his person whilst he was upon a street-car in the city of Savannah, was established by the evidence, and the court fairly submitted to the jury the question whether the loss resulted from his failure to exercise ordinary diligence. The jury could well have concluded that he was negligent; and that he ought to have taken better care of the money. The occasion was an unusual one, drawing a great crowd to Savannah, and rendering the danger from pickpockets very considerable. The administrator by his counsel cited, upon the rule of diligence, Code, sec. 2326; 2 Story's Eq. Jur., sec. 1269; *Stevens v. Gage*, 55 N. H. 175; 20 Am. Rep. 191; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716. Grant the rule stated in these authorities to be applicable, it was fully recognized by the court, and the trial was had under it. We discover no error committed by the court, or mistake made by the jury.

2. The evidence of the witness Palmer was objected to, but upon what ground was not stated, and the record does not disclose any ground of objection. We therefore decline to discuss it. Whether admissible or not, it seems to us to have done no harm.

Judgment affirmed.

SKILL AND DILIGENCE REQUIRED OF ADMINISTRATOR. — The care, prudence, and judgment required of an administrator in the discharge of his trust duties is that which is reasonably expected to be exercised by a man of fair average capacity and ability in the transaction of his own business: *Dundas v. Chrisman*, 25 Neb. 495; *Moore v. Eure*, 101 N. C. 11; 9 Am. St. Rep. 17, note 21. Being invested with full powers to collect and reduce the

whole estate into his possession, he is bound so to do with reasonable diligence. He must proceed to collect the debts and other property as soon as possible, without being requested by those interested in the estate; and if he fails to do this, and by his negligence the estate suffers a loss, as for example he fails to bring suit to collect a debt due the estate until after the statute of limitations has barred the action, or if he unreasonably delays to raise money by collecting the credits and effects of the deceased, whereby the estate is taken on execution by the creditors, such delay or neglect is unfaithful administration, making the administrator guilty of a *devastavit*, and liable for the amount lost through the statute of limitations or neglect: *Black v. Hurlbut*, 73 Wis. 126; *Harrington v. Keteltas*, 92 N. Y. 44; *Grant v. Reese*, 94 N. C. 720; *Sanderson v. Sanderson*, 20 Fla. 292. The property of the deceased in the possession, or which ought to be in the possession, of the administrator, of whatever nature, is usually termed "assets"; and this term applies, not only to the property actually taken into his possession, but to all of which he might have possessed himself by the exercise of due care and reasonable diligence. Therefore he is chargeable with personal property belonging to his intestate, though it never came into his hands, if it was lost through his negligence: *Tuttle v. Robinson*, 33 N. H. 104; *Gray v. Swain*, 2 Hawks, 15; *Williams v. Morehouse*, 9 Conn. 470; *Freeman v. Cook*, 6 Ired. Eq. 373; *Harris v. Parker*, 41 Ala. 604; *Merritt v. Merritt*, 62 Mo. 150. In *Powell v. Hurt*, 31 Mo. App. 632, it is said that the standard of care required of an administrator is that which prudent men exercise in the management of their own affairs; and that he is not only responsible for want of such care and skill, but it is his duty to speedily and diligently collect the debts due the estate, especially such as are out on personal security alone, to pay the debts and distribute the residue; and he becomes personally liable if he does not get all the money of the estate in, in a reasonable time.

As within the rule above mentioned, it has been held that where a banking house issued a certificate of deposit to one who afterwards died, and a member of the bank became administrator, the debt evidenced by the certificate will be considered as assets in his hands, even though the certificate never came into his possession: *Eaton v. Walsh*, 42 Mo. 272; and see *Hellmann v. Wellenkamp*, 71 Id. 407. So an administrator who suffered slaves of the estate to remain with an improper person as bailee for a long time, and until he sold them, and they were thus lost to the estate, is guilty of gross neglect, and answerable for the loss: *Beall v. Darden*, 4 Ired. Eq. 76. But an administrator is not an insurer of the assets of the estate, and can only be held liable for bad faith or want of reasonable diligence: *Deberry v. Ivey*, 2 Jones Eq. 370; *Beall v. Darden*, 4 Ired. Eq. 76.

After the administrator has collected the assets or reduced them to possession, he must keep them separate and apart from his own property, and give them some distinguishing mark by which they may be known or readily traced: *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Marvel v. Babbitt*, 143 Mass. 226. And though the administrator acts in perfect good faith, a failure to distinguish the assets of the estate from property of his own is a breach of duty, and a violation of his trust. Thus, if he loans the money of the estate with his own money, and only a portion of the whole is recovered, the amount recovered must be applied in discharging the debt due the estate: *Kirkham v. Benham*, 28 Ala. 501; or if he deposits the assets in bank with money of his own, by which he is enabled to draw against the common fund in his own name, or in any other manner mingles the money of the estate with money of his own, he is guilty of a conversion of the money of the

estate, and individually liable therefor: *Union Bank v. Smith*, 4 Cranch C. C. 509; *Ivey v. Coleman*, 42 Ala. 409. In such case, he is always chargeable with interest: See cases cited *supra*, and *Frey v. Demarest*, 17 N. J. Eq. 71; *Estate of Perkins*, 59 Vt. 348. If he places the funds of the estate in a bank to his individual credit, this is an appropriation of them to his individual use, for which he becomes liable upon the failure of the bank, although he had no money of his own on deposit in such bank: *Summers v. Reynolds*, 95 N. C. 404; and informed the officers of the bank at the time of making the deposit that the funds deposited were held by him in trust: *Harward v. Robinson*, 14 Ill. App. 560; *Williams v. Williams*, 55 Wis. 300; 42 Am. Rep. 708; although the money was deposited with the intention that it should be kept to replace or repay the amount of trust funds used by him: *Ditmar v. Bogle*, 53 Ala. 169.

An administrator cannot employ the assets of the estate in his own business, nor speculate with them on his own account. If he does so, it is a clear breach of trust for which he is liable if the investment is disastrous, and for the profits, if any there be. He is also liable for the highest legal rate of interest on the money so converted; and it is optional with the beneficiaries of the estate whether to accept the profits realized, or hold him liable for such interest: *Frey v. Demarest*, 17 N. J. Eq. 71; *Norris's Appeal*, 71 Pa. St. 106; *Estate of Brown*, 8 Phila. 197; *Haberman's Appeal*, 101 Pa. St. 329; *Cannon v. Apperson*, 14 Lea, 553; *Dowling v. Feeley*, 72 Ga. 557. For such tortious conversion of the property of the estate, the administrator is liable for its highest market value: *Irby v. Kitchell*, 42 Ala. 438. An administrator, during the course of the settlement of the estate, will often have money belonging to it in his hands which he cannot pay out. In such case it is his duty, in some of the states, exercising the care and prudence of an ordinary man, to so invest such money within a reasonable time that it may draw interest for the estate. If he does not, he will be held negligent, and chargeable with interest: *King v. Berry*, 3 N. J. Eq. 261; *Frey v. Demarest*, 17 Id. 71. Methods of investment are authorized by the statutes of most of the states; and where such statute is followed faithfully, the administrator is protected from liability, though the fund is lost. The same rule applies if the money is invested under order of court: *Twaddell's Appeal*, 5 Pa. St. 17; *Tucker v. Tucker*, 33 N. J. Eq. 235. But if, on the other hand, the investment is otherwise made, and proves unprofitable, he is liable to the estate for any loss, including interest: *Garesché v. Priest*, 9 Mo. App. 270; affirmed in 78 Mo. 126. The administrator is not an insurer or guarantor of the safety of the securities in his hands belonging to the estate, and if, in the absence of a statute providing the method of investment, he exercises such prudence and diligence as men of discretion and intelligence in general employ in their own like affairs, he is not answerable for any resulting loss: *McCabe v. Fowler*, 84 N. Y. 314. Thus where the estate consisted of a sum of money in the hands of a brother of the deceased, and was unsecured, while the real estate of the brother was heavily encumbered, and he agreed with the administrator to execute junior mortgages to him, and to assign to him the leases or his real estate, he to collect the rents and account therefor in a certain manner, it was held that the administrator, having acted in good faith and with prudence, was not liable for rents not paid over to him, but applied by the debtor to purposes other than those specified in the agreement: *Appeal of Dabney*, 120 Pa. St. 344.

Again, where an administrator at a sale of trust property took the notes of a non-resident purchaser of reputed wealth, with the legatees as sureties,

they being considered sufficient security for the amount under control of the administrator in the state of administration, but he failed to sue the maker of the notes until after their maturity, and his insolvency, when he sued the sureties and applied their shares to the payment of the notes *pro tanto*, he was held not liable for the unsatisfied balance: *Mickle v. Brown*, 4 Baxt. 468. But an administrator in making investments must follow instructions indicated by the will, and if he deviates therefrom he is liable for the loss, though he acted in perfect good faith and with the best intentions. Thus an executor is liable who, being directed by the will to sell the real estate and invest the proceeds, sells it and pays the money to the testamentary guardian of the legatee, after which the guardian becomes insolvent. In such case it is the duty of the executor to invest the money in other property, or in public or private securities: *Peacock v. Harris*, 85 N. C. 146. So where he is invested with power to sell property, he cannot exchange it for other property unless such exchange is a step toward the sale: *Columbus Ins. etc. Co. v. Humphries*, 64 Miss. 258. If he is directed to take security for money loaned, and he omits this duty, he is personally liable for any loss through the insolvency of the borrower or otherwise: *Smith v. Smith*, 4 Johns. Ch. 281. If he keeps money which he is directed to pay out, and it is lost through the insolvency of the party with whom it is deposited, he is liable though not otherwise negligent: *Wood v. Myrick*, 17 Minn. 408; *Guthrie v. Wheeler*, 51 Conn. 207, where it was held that an action would lie against the executor for money so retained by him. He is also liable for the loss of money loaned by him, with which he should have paid debts: *State v. Johnson*, 7 Blackf. 528. Where he is directed by the will to invest the money of the estate in a certain manner or in certain securities, and he omits so to do, he is liable for compound interest: *Ihmsen's Appeal*, 43 Pa. St. 431; *Perrine v. Petty*, 34 N. J. Eq. 193; *Shepard v. Patterson*, 3 Demarest, 183; *Barney v. Saunders*, 6 How. 535. A direction in a will that money be put at interest does not authorize an investment in bank stock, and the executor is liable for depreciation in value consequent upon such unauthorized investment: *Gilbert v. Welch*, 75 Ind. 557. But where he is directed to keep funds invested, and a profitable investment offers, larger in amount than the assets of the estate, he may supplement them with funds from other sources: *Barry v. Lambert*, 98 N. Y. 300. Where he is made liable only for loss arising from "willful default, misconduct, or neglect," he is not liable for loss from imprudent and careless investment, unless it is also proved that it was also willful: *Crabb v. Young*, 92 Id. 56. It has been held that it is negligence in the administrator to loan the trust funds to one person without taking security: *Judge of Probate v. Mathes*, 60 N. H. 433. Or where the security taken is not sufficient: *Sherman v. Lanier*, 39 N. J. Eq. 249. So the taking of personal security for a loan has been held insufficient: *Lefever v. Hasbrouck*, 3 Demarest, 567; *Bogart v. Van Velsor*, 4 Edw. Ch. 718. And even when the money is invested by loaning it on mortgages of real estate, the administrator must exercise such degree of care and prudence as ordinary men would in making a like investment in ascertaining that the title to the property mortgaged is good, and that the land at the time of the loan is enough to furnish adequate security for the payment of the money when the mortgage is called in: *Wilson v. Staats*, 33 N. J. Eq. 524; *Bogart v. Van Velsor*, *supra*; *Perrine v. Petty*, 34 N. J. Eq. 193. Where investment is made in municipal bonds, bank stock, or private corporation stock, without an order of court, it is at the administrator's risk, and he is liable for any loss: *Tucker v. Tucker*, 33 Id. 235; *Garesché v. Priest*, 78 Mo. 126.

The decisions are uniform that an investment of the funds of the estate in confederate bonds by the administrator was a breach of trust which could not be condoned by an order of court, and for which the personal representative is personally liable: *Horn v. Lockhart*, 17 Wall. 570; *Lamar v. Micou*, 112 U. S. 452; *Glasgow v. Lippe*, 117 Id. 327. A statute authorizing such investment is unconstitutional and void: *Houston v. Deloach*, 43 Ala. 364; *Powell v. Boon*, 43 Id. 459. An administrator who in good faith and in sound discretion decides to retain an investment made by the deceased in railroad stock, when it is gradually failing in value, is not responsible for the depreciation, although the stock becomes worthless: *Buoker v. Pierce*, 130 Mass. 262. In such cases all that is required is good faith and the exercise of a sound discretion; and the fact that the money of the deceased is invested by him in stock, shares, mortgages, or other securities, will go far in justifying the personal representative in continuing the investment: *Parker v. Glover*, 42 N. J. Eq. 559; *Hanbest's Appeal*, 92 Pa. St. 482; *Peckham v. Newton*, 15 R. I. 321; *In re Weston*, 91 N. Y. 502. But he is not justified in disposing of such investment for less than the market value of the stock, bonds, etc.: *Spaulding v. Wakefield*, 53 Vt. 660. Government bonds and real estate situate in his state seem to be the only absolutely safe property in which the personal representative may invest the funds of the estate so that the investment will be recognized by the courts as safe and sure: *Ormiston v. Olcott*, 84 N. Y. 343; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Delafeld v. Schuchardt*, 2 Demarest, 435; and then the investment must not be made in his own name, or he may be guilty of a *devastavit*: *Richardson v. McLemore*, 60 Miss. 315; *Syme v. Badger*, 92 N. C. 706. If an administrator in making investments acts in good faith, within the requirements of the law, the courts will treat him with liberality and leniency, and not hold him responsible for losses, in the absence of willful misconduct, especially when he acts under the advice of counsel, or makes a mere error of judgment. Where there is any doubt, he will not be held responsible if he has exercised that degree of diligence and good faith generally used by men of sense and experience in the affairs of their own business: *Thompson v. Brown*, 4 Johns. Ch. 619; *Watkins v. Stewart*, 78 Va. 111; *Merritt v. Merritt*, 62 Mo. 150; *Perrine v. Vreeland*, 33 N. J. Eq. 102; *Cooper v. Cooper*, 77 Va. 198; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545; *Jacks's Appeal*, 94 Pa. St. 367; *Legrand v. Fitch*, 79 Va. 635; *Torrence v. Davidson*, 92 N. C. 437; 53 Am. Rep. 419; *Syme v. Badger*, 92 N. C. 706.

As to the degree of diligence required of administrators in the employment of an attorney or agent, it seems to be the same as in the other cases above noted, namely, good faith and reasonable diligence and discretion. Where, therefore, acting with such care and discretion, he intrusts claims due the estate to an attorney or agent who is capable, he cannot be made to answer personally for a loss if the agent or attorney collects the money, applies it to his own use, and becomes insolvent: *Calhoun's Estate*, 6 Watts, 185; *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Christy v. McBride*, 1 Scam. 75.

Within this rule, it is negligence, for which he is personally liable, to employ an unskilled agent or attorney to manage a transaction of great magnitude for the estate, when it was amply sufficient and able to employ a capable and competent person: *Wakeman v. Hazleton*, 3 Barb. Ch. 148. The personal representative is not liable for a debt lost by mistake, in pursuing remedies, where he acts in good faith, and under the advice of counsel: *King v. Morrison*, 1 Penr. & W. 188; *Thompson v. Brown*, 4 Johns. Ch. 619. Nor is he liable for the misconduct of an auctioneer, not imprudently employed by him, who sells the assets and keeps the proceeds: *Edmond v. Peake*, 7

Beav. 239. But he is liable if he trusts the assets in a careless manner to those he had no right nor need to employ, as to a near relative or personal favorite: *McCloskey v. Gleason*, 56 Vt. 264; 48 Am. Rep. 770; *Earle v. Earle*, 23 N. Y. 104.

Where an administrator keeps the funds of the estate in an insecure place in his dwelling-house for nearly a year, whence they are finally stolen, he is negligent, and answerable for the loss, especially where they might have been deposited in a bank without extraordinary trouble: *Cornwell v. Deck*, 8 Hun, 122. But where such funds are stolen from the safe or dwelling of the administrator, without negligence, and when it is shown that he exercised due discretion and ordinary care, there being no bank or other place of deposit within a reasonable distance, he is not liable for the loss: *Stevens v. Gage*, 55 N. H. 175; 20 Am. Rep. 191; *Fudge v. Durn*, 51 Mo. 264; *Furman v. Coe*, 1 Caines Cas. 96.

While an administrator is liable for the loss of the assets of the estate deposited in a bank in his own name, still, if he so deposits them in the name of the estate, and for a reasonable time, he will not be liable for their loss occasioned by the subsequent failure of the bank, provided that, at the time the deposit was made, the bank bore a good reputation, and nothing happens to indicate such weakness or insolvency as would induce an ordinarily prudent and careful person to withdraw such funds: *Moore v. Ewe*, 101 N. C. 11; 9 Am. St. Rep. 17; *Twitty v. Henser*, 7 S. C. 153; *Cox v. Roome*, 38 N. J. Eq. 259; *Jacobus v. Jacobus*, 37 Id. 17; *Norwood v. Harness*, 98 Ind. 184; 49 Am. Rep. 739.

CLAY v. WESTERN UNION TELEGRAPH COMPANY.

[81 GEORGIA, 285.]

TELEGRAPH COMPANIES — NON-DELIVERY OF TELEGRAM — DAMAGES —

Where the non-delivery of a telegram in time to enable the party to whom it is sent to meet a train and comply with the direction of the sender does not cause the former party to suffer any damage, but simply to lose a mere opportunity or possibility to make some money, the company is not liable to him in damages for such non-delivery.

S. A. Reid, for the plaintiff.

Guerry and Hall, for the defendant.

BLANDFORD, J. It appears that a telegram was sent to Clay, the plaintiff, as follows:—

“BULLARD’S, GA., Jan. 8, 1885.

“To J. J. CLAY,—Meet us at E. T. depot on this evening’s train prepared to arrange for shipment to Indianapolis my mother-in-law’s remains.

(Signed)

“D. G. HUGHES.”

The telegraph company failed to deliver this telegram in time for Clay to meet the train and comply with the directions of the sender. Clay brought his action against the company for damages.

We cannot see, from the allegations in the declaration, how Clay was damaged. It does not appear that he suffered any damage. It appears that he lost a mere opportunity or possibility to make something. If he had received the telegram, and had appeared at the depot in time to meet the remains, and if Mr. Hughes had declined his services, all that he could have recovered from Hughes would have been his expenses, and a proper compensation for his trouble in getting ready to perform these services. Clay did not go to meet the remains, and did not spend anything on this account; he was in the same condition after receiving the telegram that he was before; no loss came to him. It is contended that if he had received the telegram, he would have made a considerable amount of money as profits from services rendered. He might have made it, or he might not. As stated, this was merely a possibility. Under the allegations in the declaration, we do not think he had any right to recover damages; and that the judge did right to sustain the demurrer to the declaration.

As to whether the telegraph company is liable at all for non-delivery of the telegram, we say nothing as to that at this time. There was plenty to authorize the court to sustain the demurrer without going into that question at all.

Judgment affirmed.

TELEGRAPH COMPANIES — NON-DELIVERY OF TELEGRAM — DAMAGES. — Telegraph companies are liable for losses consequent upon their negligence in the transmission and delivery of messages: *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630, and note 634. As to what are the proper elements of damage in actions against telegraph companies for a failure to send or deliver messages, see extended note to *Western Union Tel. Co. v. Cooper*, 10 Id. 778–790; and for the measure of damages in such cases, see *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and note 711; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 790.

GLENN v. HOWARD.

[51 GEORGIA, 232.]

STOCK AND STOCKHOLDERS — CALL FOR UNPAID ASSESSMENTS — STATUTE OF LIMITATIONS. — Where, under an act of incorporation, a call for unpaid stock subscriptions is to be made upon stockholders whenever necessary, and no call is ever made, but the corporation assigns for the benefit of creditors without giving the assignee power to make such call, after which the court decrees that the assignee be removed, the corporation debts ascertained, a new trustee appointed to carry out the purposes of the assignment, and a call made for unpaid stock subscriptions, the statute of limitations does not begin to run against the trustee until such call is made.

Calhoun, King, and Spalding, and C. Henry Cohen, for the plaintiff.

Frank H. Miller and William K. Miller, for the defendant.

BLANDFORD, J. This case was argued at the last term of this court, and the decision held up in order to get a decision of the supreme court of the United States upon the same question; but we are now satisfied that no such decision will be rendered by that court within the time allowed for the decision of the present case, it being imperative that the case shall be decided at this term.

Glenn, trustee, brought his action against Howard, in the superior court of Richmond County, in which he alleged that Howard was a subscriber to a certain number of shares of stock in the National Express and Transportation Company; that on September 20, 1866, that company made an assignment to certain persons for the benefit of the creditors of the corporation; that thereafter, to wit, in 1871, within five years after the assignment was made, a bill was filed in the chancery court of Richmond, Virginia, by certain creditors of the corporation against the corporation and the trustees or assignees appointed under the assignment, which bill prayed the removal of the assignees and the appointment of some other persons in their stead; it also prayed that an account be taken as to the debts of the corporation, and that an assessment be made upon the stockholders who owed upon their unpaid stock subscriptions. Upon that bill a decree was rendered on the 4th of December, 1880, in which the debts of the corporation were ascertained, and in which it was directed that the assignees appointed under the deed of assignment be moved, and that Glenn, the present plaintiff, be appointed trustee to carry out the purposes of that conveyance. The decree further directed

that a call be made upon these subscribers to pay thirty per cent upon their unpaid subscriptions. Within four years from that decree, the present action was brought.

A demurrer was filed to the declaration upon the ground that the action was barred by the statute of limitations; and the court below sustained the demurrer. Glenn, the trustee, excepted to that decision, and brought the case to this court for review.

Under the facts alleged in the declaration, Was the cause of action barred? The supreme court of Virginia, in a similar suit, involving the same question (*Vanderwerken v. Glenn*, decided in 1888), held that the statute of limitations did not commence to run until after the call was made, under the decree above referred to. The supreme court of Maryland, when the question came before it, held to the same effect: *Glenn v. Williams*, 60 Md. 95. The supreme court of Alabama, in a case involving the same question (*Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92), likewise held that the statute of limitations did not begin to run until this call was made. Here, then, are three courts of last resort of different states of the Union that have directly decided the question made in the present case. We are aware that there is a decision to the contrary by Judge Brewer of the United States circuit court (*Glenn v. Dorsheimer*, 23 Fed. Rep. 695), in which it was held that where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction; and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case. Under the act incorporating this company, a call was to be made upon the stockholders for their unpaid subscriptions, whenever necessary, by the president and directors of the corporation. No such call was ever made; and in the deed of assignment no authority was given to the assignees to make a call; and it is a rule in chancery, well recognized and uncontroverted, that wherever the sub-

scribers fail to pay up their stock, and the officers of the corporation will not make the call, a court of chancery will make it at the instance of any creditor, as was done in this case. When the call was made under the decree in this case, it became a call as effectually as if it were made by the officers of the corporation, who were authorized by the charter to make it. Until this call was made, the statute of limitations did not begin to run.

The result of our deliberations is, that the judgment of the court below is reversed.

Judgment reversed.

STOCKHOLDERS, THEIR LIABILITIES FOR UNPAID SUBSCRIPTIONS, ETC.: See extended note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806 et seq.

WESTERN AND ATLANTIC R. R. Co. v. YOUNG.

[81 GEORGIA, 897.]

INTEREST AT THE LEGAL RATE CANNOT BE ADDED BY THE JURY, IN THEIR DISCRETION, to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased.

DUE CARE FOR ITS OWN SAFETY IN A CHILD NINE YEARS OF AGE is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation. Neither the average child of its own age, nor the prudent man, is a standard by which to measure its diligence with legal exactness. Such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires.

IT IS NEGLIGENCE AS MATTER OF LAW for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. The existence of an ordinance, however, is matter of fact to be referred to the jury; the court cannot notice it judicially. Such an ordinance, regulating speed of trains, and requiring flag-men and watchmen to be kept at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters. No unreasonable ordinance can be valid.

FOR A PERSONAL INJURY TO A CHILD NINE YEARS OF AGE, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Amongst the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority.

DAMAGES for personal injuries. The thirty-sixth, thirty-eighth, and fortieth grounds of motion for a new trial are given

hereinafter. These, together with the facts disclosed in the opinion, state the case. 36. "As to the measure of damages, the onus of proof is upon the plaintiff to establish the amount of his damage. As the trial judge cannot know in advance what view the jury may take of the evidence adduced, or whether it will find the issues with the plaintiff or defendant, it is my duty to give you certain instructions as to the law governing the measure of damages in this class of cases. If you find for the plaintiff, these rules will be of service to you; if you find for the defendant, you will have no occasion to consider or apply them. The plaintiff claims, in the first place, that his capacity to labor and earn money during his future life has been permanently destroyed, as the result of defendant's negligence; and the law has no procrustean rule for the ascertainment of damages of this sort. Health, age, heredity, habits, avocation, money made by one's labor, prospect of increased earnings from experience or skill acquired, or diminished capacity as the result of growing years and infirmity, prospect of obtaining steady and remunerative employment, and the like,—all these circumstances, so far as applicable to the facts of this case, are proper to be considered by the jury. It is not denied in this case that the plaintiff was too young to have adopted an avocation in life, or to begin to earn money by his labor. And it is conceded that whatever he might earn hereafter and until he attains his majority, that is, twenty-one years old, belongs to his parents, and that nothing can be allowed him for diminished capacity to labor this side of twenty-one years of age. Certain tables have been introduced, illustrating the number of years a child of the plaintiff's age will probably live, according to the doctrine of expectancy of years as compiled in the business of life insurance. These tables are not binding as such upon the jury, but may be considered by you along with the other evidence in this case, and their conclusions tested in the light of common observation and experience, and their results modified by such evidence, if any, as this case may show to affect this particular plaintiff. Damages are given as compensation for injury done, and generally this is the measure where the injury is of a character capable of being estimated in money. If this plaintiff has been permanently injured as the result of the defendant's negligence, and you have no *data* by which you may estimate the probable future earnings of the plaintiff after he attains his majority, you would be authorized to award him such sum as,

in your opinion, would fairly and reasonably compensate him for his pecuniary loss, if any, having in view his degree of intelligence and his opportunities to equip himself for the race of life according to his present *status* or condition in life, and in view of the pursuits he may yet apply himself to and might have applied himself to if he had not been injured." 38. "I am of the opinion, and so charge you, that the law is, that, in a case where the injured party is too young to have selected an avocation, or to begin to illustrate by his labor his wage-earning capacity, the matter of the amount of damages for a permanent injury rests in the sound discretion of the jury, to be exercised in the light of their common observation and experience, and aiming to compensate the plaintiff for the injury actually sustained in this respect." 40. "The plaintiff also claims damages for pain, past, present, and future, which he says he has suffered and will continue to suffer as the result of the injury, and for an alleged deformity or impairment of his physical symmetry. As to cuts, wounds, bruises, and the like, and the pain and suffering resulting therefrom, or impairment of physical proportion and symmetry resulting from the loss of a member, the law has no standard by which the amount of damages of this sort may be ascertained. Damages of this kind are peculiarly in the discretion of the jury. The law refers the matter of amount, if any, to be awarded as to this item, to the enlightened consciences of impartial jurors, whose aim it is to be fair and reasonable, just and not oppressive. If you find for the plaintiff, you might, if you see proper to do so, award further damages in the nature of interest on the sum found, that is to say, damages for the detention of the sum awarded, computed at seven per cent per annum, from the date of the injury to the present time. If you allow damages for a detention of the sum found, in the nature of interest, you will add it to the other sum, and bring in your verdict for one single sum."

Julius L. Brown, for the plaintiff in error.

Hoke and Burton Smith, contra.

BLECKLEY, C. J. The plaintiff below, a boy nine years of age, obtained a verdict for ten thousand dollars, for personal injuries received on a public street crossing in the city of Atlanta, by reason of being thrown down and run over by the cars of the railway company, his chief injury being the loss of his right arm, which had to be amputated above the elbow.

The company moved for a new trial, upon forty grounds, all of which were overruled.

1. The last ground of the motion complains of the charge of the court to the effect that the jury might, in their discretion, award, upon discretionary damages, further damages in the nature of interest, computed at seven per cent, from the date of the injury to the time of trial. This instruction was error. There is no authority of law for treating the jury as clothed with a double discretion,—a discretion to be exercised, first, in fixing the amount of the plaintiff's damages, and then in augmenting that amount by an assessment in the nature of interest for detention of the money, or delay of payment. As long as the principal sum was not only unascertained, but unascertainable save by the enlightened conscience of impartial jurors, the law neither appointed a day of payment nor exacted any tender.

The privilege of tendering by guess, given by statute in section 3056 of the code, is not granted as a resource to shun or stop interest, but to avoid cost. As far back as 1799 we have statutory evidence adverse to the policy of increasing verdicts on account of interest upon unliquidated demands: Cobb's Dig. 495. It was thought consistent with this statute to increase the damages in trover by the addition of interest on the value of the property from the time of conversion: See *Collier v. Lyons*, 18 Ga. 648, and other cases. So in *Georgia R. R. etc. Co. v. Garr*, 57 Id. 280, 24 Am. Rep. 492, the power of the jury to add interest in computing damages recoverable by a widow for the homicide of her husband is tacitly recognized. And in *Central R. R. v. Sears*, 66 Ga. 499, there is apparently a like recognition of the power, whilst the direct adjudication was that it is not obligatory as a duty. To the same effect, perhaps, is *Western etc. R. R. Co. v. McCauley*, 68 Id. 818, where the action was for killing a bull. But in all these cases the damages recoverable were special, and had to be proved by evidence applying directly or indirectly to values; whilst in the present case there is no such evidence, and the entire recovery is for damages of a nature incapable of any standard of measurement external to the minds and consciences of the jury. In this respect, though they are not punitive, all claim to punitive damages having been renounced at the trial, they are as indefinite and indeterminate in their elements as are damages of that class; consequently the case of *Ratteree v. Chapman*, 79 Id. 574, which holds that the jury should not be

instructed that they are authorized to add interest in assessing damages, where punitive damages can be allowed, rules this case. In principle, the two cases are one and the same. To add interest to discretionary damages is to multiply uncertainty by certainty, the indefinite by the definite, a mixture of incongruous elements which subjects one of the parties to the burden, and gives the other the benefit of both kinds. If the time of realizing discretionary damages is to be considered (and doubtless the jury may consider it), it should be left as one of the terms of the general problem of damages, unfixed like all the rest of the terms. The rate of interest as established by law has no relevancy to the matter. Sums ascertainable only by the enlightened conscience of impartial jurors do not bear interest before verdict, either as interest or as damages, with or without discretionary allowance by the jury.

2. The cars which hurt the boy were being switched, in the heart of the city, from the premises of one railroad company to those of another. They were running backwards. The boy was passing along a street which divided the premises of the one company from those of the other, and which crossed eight parallel tracks. He was upon the sidewalk. His diligence in looking out for danger was and is a main point in the merits of the litigation. The court charged (twenty-fourth ground of the motion) that "ordinary diligence is that degree of care and attention which ordinarily reasonable and prudent persons would use under the same or similar circumstances. If the plaintiff was a child of tender years, it would be that degree of care and attention which a child of average powers and capacity, of the same age, would use under the same or similar circumstances." The objections to this charge, as indicated in the motion, are, that the court should have used "men" instead of "persons," and that it was otherwise illegal. We do not go back to the reported cases to see whether the care of "ordinarily reasonable and prudent persons" is equivalent to the care of "every prudent person," but we suggest that the standard of ordinary care, under our law, is the care of every prudent man, and not of the average or ordinary prudent man or person. In Beach on Contributory Negligence, section 9, page 23, mention is made of the ideal average prudent man, whose conduct theoretically is a constant, but we prefer to look for a standard to the real man,—the prudent man,—and to exclude the average altogether from the test.

When the class "prudent" has been reached, every individual of the class ought to be considered prudent, and there is no occasion to invent an average ideal man to represent the class. "A prudent man foreseeth the evil and hideth himself." I have examined the cases cited by Mr. Beach with reference to averaging the class "prudent," except *Walsh v. Oregon R. R. Co.*, 10 Or. 250, and in only one of them, *Coates v. Canaan*, 51 Vt. 138, do I find "average" treated directly as an element in defining ordinary care.

But conceding that "average" may serve as a standard in adults, it will not follow that a like standard should have recognition as to children. Could we assume an ideal constant as to the former, who that knows how precocious are some children, and how backward are others, would carry the assumption down to childhood, and apply it to children? Capacity (which includes personal experience as well as natural gifts) is the main thing. Age is of no significance except as a mark or sign of capacity. Some of the decisions mention age only, but most of them couple capacity with it. As specimens, see *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29; *Washington etc. R. R. Co. v. Gladman*, 15 Wall. 401; *Sioux etc. R. R. Co. v. Stout*, 17 Id. 657; *Munn v. Reed*, 4 Allen, 431; *Mobile etc. R. R. Co. v. Crenshaw*, 65 Ala. 566; *Byrne v. Railroad Co.*, 83 N. Y. 620; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645; *Dowd v. Chicopee*, 116 Mass. 93; *Lynch v. Smith*, 104 Id. 52; 6 Am. Rep. 188. The study of these and other like cases will lead to two conclusions: 1. That no court can hold that childhood and manhood are bound to observe the same degree of diligence; 2. That while the name "ordinary care" is frequently applied to the diligence exacted by law of a child, there is little propriety in doing so; due care is always the better and more accurate description. Certainly extraordinary care, in any proper sense of the term, can never be exacted of young children, and slight diligence would often be due care on their part, when in adults it would be gross negligence. The comparative degrees, extraordinary, ordinary, and slight, it seems to us, cannot be fitly applied to children in reference to measures to be observed by them for their own security. If such an application was suggested by *Vickers v. Atlanta etc. R. R. Co.*, 64 Ga. 306, it was an inadvertence, not in what was said, but in what was implied. Due care on the part of this boy might fall far short of that of a prudent man, and yet exceed that of average boys of his own age. According to the evi-

dence as to his standing at school, he was much above the average of his class.

3. As to the charge of the court touching negligence as matter of law, the application of the statute and of the city ordinance, the duty to ring the bell and hold trains in check so as to stop them at street crossings, the duty to comply with the ordinance as to the speed of trains not stopped, and as to keeping watchmen or flagmen at certain crossings, and as to responsibility of the railroad companies for inattention or negligence by such flagmen or watchmen (in respect to all which, see twenty-fifth, twenty-sixth, twenty-eighth, thirty-first, thirty-third, thirty-fifth grounds of the motion), we have little fault to find. On these subjects we merely refer to cases already adjudicated: *Atlanta etc. R. R. Co. v. Wyly*, 65 Ga. 120; *Central R. R. Co. v. Smith*, 78 Id. 694; *Georgia R. R. Co. v. Carr*, 73 Id. 557; *Western & A. R. R. v. Meigs*, 74 Id. 857; *Central R. R. Co. v. Russell*, 75 Id. 810. We see no reason to doubt that a city, which is the terminus of numerous connecting railways which interchange business within the corporate limits, may, by virtue of the usual grant of police powers found in municipal charters, not only regulate the speed of trains and moving cars, but prescribe regulations for maintaining the necessary flagmen or watchmen at street crossings, to secure the safety of the public, and that railroad companies, as matter of legal duty, must comply with such requirements and regulations, if they are reasonable. Of course, nothing unreasonable can lawfully be prescribed by virtue of general police powers, or if prescribed, can be enforced. The mixing up of flagmen or watchmen with the official police of the city is irregular, but seems to us not to vitiate an ordinance on the subject which railroad companies have virtually recognized and assented to, by employing and using as flagmen or watchmen persons invested with general police powers in addition to their functions as railroad employees.

We will add that the style of the charge touching the city ordinances was too absolute and unconditional in treating them as law, without any reference to the jury of the question of fact as to whether there were such ordinances before them, and perhaps as to whether they were reasonable. The manner of dealing with the subject in the *Central R. R. Co. v. Smith*, *supra*, was more satisfactory, save that the ordinance involved in that case was not applicable to the facts.

4. On the measure of damages, see the fourth head-note.

We think the court laid down substantially the correct rule in the thirty-eighth ground of the motion for a new trial, and in that part of the fortieth ground preceding the instruction relating to the discretion of the jury in allowing interest. We regard what is complained of in the thirty-sixth ground of the motion as subject to just criticism, and we think it a sound direction to give, that this part of the charge be omitted on a future trial. A brief but excellent model of a charge upon the measure of damages, where the subject of the injury was a child, will be found in *Davis v. Central R. R. Co.*, 60 Ga. 329.

The court erred in not granting a new trial, more especially upon the fortieth ground of the motion. But we put the reversal of the judgment upon the whole case, and think its merits should be investigated anew, in the light of this opinion. As to grounds of the motion which we have not referred to, we regard them as free from substantial error.

Judgment reversed.

INTEREST — NOT ALLOWED UPON UNLIQUIDATED DAMAGES: See *Township of P. v. Graver*, 125 Pa. St. 24; 11 Am. St. Rep. 867, and note; *Ratteree v. Chapman*, 79 Ga. 574. Compare *Georgia R. R. etc. Co. v. Garr*, 57 Id. 277; 24 Am. Rep. 492.

NEGLIGENCE — CHILDREN. — Children are not bound to use as much care and watchfulness as adults under similar circumstances, in order to avert dangers which befall them: *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Keffe v. Milwaukee etc. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Dec. 308; *Moebus v. Herrman*, 108 N. Y. 349; 2 Am. St. Rep. 440; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751, and note.

MUNICIPAL CORPORATIONS — RAILROADS. — A railroad company upon entering a city subjects itself to the police regulations and ordinances of such city: *City and Suburban R'y Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106, and note 106, as to right of municipality to pass ordinances regulating railroad operating within its limits; see also *Baltimore etc. R. R. Co. v. State*, 29 Md. 252; 95 Am. Dec. 528. And so a city may pass an ordinance requiring a railroad company within its limits to keep a flagman at its crossings, and to erect gates at such crossings: *Pennsylvania Co. v. Stegmeier*, 118 Ind. 305; 10 Am. St. Rep. 136.

MUNICIPAL ORDINANCES are not judicially noticed: See note to *Lanfear v. Meister*, 89 Am. Dec. 668, 669.

MEASURE OF DAMAGES FOR PERSONAL INJURIES: See *Richmond etc. R'y Co. v. Normant*, 84 Va. 167; 10 Am. St. Rep. 827, and particularly the cases cited in note at 834; see also recent cases: *Brunswick v. White*, 70 Tex. 504; *Board of Comm'rs v. Arnett*, 116 Ind. 438; *Knowles v. R. R. Co.*, 102 N. C. 50; *Pennsylvania R. R. Co. v. Connell*, 127 Ill. 419.

FLUKER v. GEORGIA RAILROAD AND BANKING Co.

[51 GEORGIA, 451.]

THE DOMINION OF A RAILROAD CORPORATION OVER ITS TRAINS, TRACKS, AND "RIGHT OF WAY" is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases when they come to transact their own private business with passengers or other third persons, and admit whom it pleases when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches.

A MERE IMPLIED LICENSE, NO MATTER HOW LONG ENJOYED, to transact such business, for which no consideration has been paid, is revocable at any time, and such revocation results from notice not to prosecute the business in the future.

ONE WHO PERSISTS IN USING THE LICENSE AFTER NOTICE OF ITS TERMINATION may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his expulsion from the premises.

A LESSEE OR LICENSEE OF THE EXCLUSIVE PRIVILEGE OF ENTERING THE CARS or upon the right of way to sell or supply lunches is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers.

A MASTER HAS NO RIGHT OF ACTION FOR AN ASSAULT, or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom.

H. T. and H. G. Lewis, for the plaintiff.

J. B. Cumming and J. A. Billups, for the defendant.

BLECKLEY, C. J. The plaintiff had, for some nine years, without objection on the part of the company, exercised the privilege of coming upon the right of way and dealing with passengers by supplying them with lunches. A part of the time he had even used the platform of the company for this purpose, and perhaps also had been allowed to enter the cars. The privilege, except as to coming upon the right of way, was revoked some four years previously to October, 1886. On the 10th of said October, the plaintiff received notice to cease the exercise of the privilege as to the right of way, and was also informed that the exclusive right of serving lunches to passengers had been leased by the company to one Hart. About a week after receiving this notice, the plaintiff's servant was on two or three occasions expelled from the right of way by a servant of the company, and in one instance the company's servant, in controlling the action of the plaintiff's servant, did not desist where the right of way stopped, but conducted the

intruder across the public street and up to the plaintiff's door. The plaintiff seeing that he could not carry on his business through the medium of a servant, undertook to conduct it himself, and he also was expelled, both Hart and the defendant's servant co-operating in his expulsion, and Hart, but not the servant, continuing the use of force beyond the right of way and into the public street. The plaintiff, after this, undertook to advertise his business by ringing a bell in the street in front of his premises, and Hart alone interfered with that, and committed an assault upon him in the street. For these grievances he brought his action against the company. The case was tried, and the court granted a nonsuit.

1. It is contended that the company has no such exclusive dominion over the tracks and spaces embraced in its right of way as to entitle it to exclude therefrom any person entering thereon in an orderly manner and upon lawful business; and especially, that it cannot discriminate against one person and in favor of another. We have discovered no authority for this position, either in its more limited or more extended form. On the contrary, it would seem that the very nature of property involves a right to exclusive dominion over it in the owner. We cannot believe that there is a sort of right of common lodged in the public at large to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make inclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers, or with persons other than the companies themselves. To do this, however, they must give fair notice; inasmuch as by a sort of common law or common understanding in this country, an unforbidden entry on uninclosed lands is not a trespass, unless the intruder comes for some improper purpose, or to remain an undue or unnecessary length of time. It is manifest that the grant of the privilege to one or more is no rightful cause of complaint on the part of others to whom a like privilege is denied. The right to make such discriminations is incident to the ownership of all property which is not devoted to some use that in and of itself involves an invitation to the public to enter and enjoy for the

time being. The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must be dependent upon the company for the privilege. And whether the permission, when granted, be called a lease or a license, makes no difference; nor does it make any difference, except in the matter of revocation, whether the grant be gratuitous or made for a consideration: *Barney v. Oyster Bay etc.*, 67 N. Y. 301; *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547; *Hazen v. R. R. Co.*, 2 Gray, 577; *Junction R. R. Co. v. Philadelphia*, 88 Pa. St. 424; *Sweeny v. R. R. Co.*, 128 Mass. 5; *Pittsburg etc. R. R. Co. v. Bingham*, 29 Ohio St. 364; 23 Am. Rep. 751; *Keller v. Dillon*, 26 Ga. 701.

2. That the company allowed the plaintiff to sell his lunches upon its right of way for a long space of time, say nine years, without objection, gave him no right to the privilege in perpetuity. He paid the company no consideration, but enjoyed a mere implied license, which was revocable at any time, certainly so after giving him reasonable notice. In this instance, he had notice for about one week before any decisive steps were taken to put a stop to his dealings. He refused to yield to the notice, and for that reason alone a resort to force on the part of the company was had. There can be no doubt that such a license could be terminated by notice: 1 Washburn on Real Property, 400; 3 Kent's Com. 452, 453; *Parish v. Kaspare*, 109 Ind. 586; *Wingard v. Tift*, 24 Ga. 179; *Colcord v. Carr*, 77 Id. 106; *Cook v. Pridgen*, 45 Id. 340; 12 Am. Rep. 582; *Mayor of Macon v. Franklin*, 12 Ga. 239; *Sheffield v. Collier*, 3 Id. 82.

3. The force used by the company's servant was of a mild and gentle character, certainly so as against the plaintiff himself. Not only was no violence done to life or member, but not even was the plaintiff treated rudely; and the company's servant desisted before the plaintiff had withdrawn beyond the right of way. A far greater degree of force than that used would have been justifiable had the plaintiff rendered it necessary in order for his expulsion to be accomplished: *Wood v. Leadbetter*, 13 Mees. & W. 838.

4. For the violence of Hart, the lessee or licensee of the privilege, the company is not responsible. He was not acting as a servant of the company, but in his own behalf; and although the company, by its servant, co-operated with him in

the beginning, that co-operation ceased before Hart had transcended the limits of his own rights. If Hart pursued the plaintiff into or upon the street, he alone is responsible. The company's servant declined to take part in that proceeding, but confined himself and his action to the company's premises. This same distinction applies to Hart's interference with ringing the bell in front of the plaintiff's premises on the street. Hart alone undertook to deal with plaintiff for using the bell, and so far as appears, no servant of the company was even present on that occasion. His conduct then and there certainly affords no cause of action against the company.

5. It does appear, however, that the company's servant, although he did not chase the plaintiff beyond the right of way, pushed the matter further in dealing with the plaintiff's servant. He not only forced him off the right of way, but across the street, and to the plaintiff's door. This may give a cause of action to the servant, but it furnishes none to the plaintiff, because there was no loss of service, nor any impairment of capacity to render service. And for a master to have a right of action for an assault and battery committed upon his servant, one or both of these consequences must ensue: *Robert Mary's Case*, 9 Coke, 130 a; Wood on Master and Servant, sec. 224; Bigelow on Torts, 108, 109; 1 Minor's Institutes, 224, and authorities cited.

Judgment affirmed.

RAILROADS, AUTHORITY OF WITH RESPECT TO ITS RIGHT OF WAY. — A railway company has the right to forcibly eject from its premises a hotel-runner who comes there to solicit patronage for his hotel in violation of a regulation of the company of which he has knowledge: *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547. So a railway company may, by regulation, forbid hackmen, peddlers, expressmen, and loafers from entering a passenger-room at its station: *Summitt v. State*, 8 Lea, 413; 41 Am. Rep. 637. A railway company may grant to one person the exclusive right of coming upon its grounds to solicit the patronage of incoming passengers: *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35; 9 Am. St. Rep. 661, and note 666.

LICENSES, PAROL, GRANTED WITHOUT CONSIDERATION, are revocable at pleasure: *Wheelock v. Noonan*, 108 N. Y. 179; 2 Am. St. Rep. 405, and note 409; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Foster v. Browning*, 4 R. I. 47; 67 Am. Dec. 505; compare note to *Ricker v. Kelly*, 10 Id. 40-45; note to *Rerick v. Kern*, 16 Id. 501-506; note to *Hasleton v. Putnam*, 54 Id. 166, 167; note to *Johnson v. Skillman*, 43 Id. 195-199.

MASTER AND SERVANT. — A master cannot maintain an action for an assault upon his servant, unless he thereby has lost the services of such servant: *Dennis v. Clark*, 2 Cush. 347; 48 Am. Dec. 671; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; *Burgess v. Carpenter*, 2 S. O. 7; 16 Am. Rep. 643; *Daniel v. Swearingen*, 6 S. O. 297; 24 Am. Rep. 471.

SHORES v. BROOKS.

[81 GEORGIA, 468.]

FOR THE LANDLORD TO GO UPON THE RENTED PREMISES before the year has expired, break open a locked outhouse, and take therefrom the tenant's cotton, against his protest and remonstrance, is a trespass for which punitive damages may be awarded, even though the cotton be bound for supplies which the landlord has furnished, and though such forcible seizure of it be made for the purpose of selling it, and though it be fairly sold, and the proceeds applied to the debt for supplies.

WHERE THE TENANT, AFTER SELLING TO HIS LANDLORD SOME OF HIS EFFECTS, locks them up in a house in his possession on the premises, and of which he is entitled to the use, and the landlord, on finding the house locked, puts another lock on it, not calling upon the tenant to surrender the property sold, and after keeping the house thus locked for several days, excluding the tenant from entering or using it, breaks open the house, and takes therefrom the property which he has purchased, up to this time having made no demand upon the tenant to deliver it, this also is a trespass for which punitive damages may be awarded.

IN ORDER TO RENDER THE ADVICE OF COUNSEL ADMISSIBLE EVIDENCE in mitigation of damages, it must appear that the advice was given upon a full and fair statement of the facts, or of such of them as were material to the question on which counsel was consulted.

DAMAGES for trespass under a lease which had not yet expired. The other facts are disclosed in the opinion.

W. A. Post and W. Y. Atkinson, for the plaintiff in error.

L. P. Barnes and P. F. Smith, contra.

BLECKLEY, C. J. 1. The evidence indicates that the contending parties were of different colors. The case presents the race problem in a mild form, which problem, in all its forms, can be solved by the Golden Rule, "Do unto others as you would that they should do unto you." The landlord broke open his tenant's house, and took therefrom three thousand pounds of cotton in the seed. This was done in the month of October; and the excuse for it was that the tenant had not paid the charges to which the cotton was subject, and would not sell the cotton nor carry it to market as soon as the landlord thought it desirable. If the cotton was subject (and the tenant did not deny this) to the charges upon it, the landlord had his remedy by law, and had no right to act as his own sheriff in making the seizure. The end which he had in view was not improper; but he was bound to the observance of proper means as well as a regard to a proper end. Why should he have violated the law to do right when he could equally as well have observed the law and done right? We cannot doubt that by breaking open the locked outhouse

to get possession of the cotton, he committed a trespass for which punitive damages might be awarded. And that he acted fairly in selling the cotton and applying the proceeds to the debt for supplies would be no excuse for the outrage which he committed by illegally and forcibly obtaining possession of it.

2. The tenant sold to the landlord certain property, and locked it up in one of the outhouses of which he was entitled to the use. The landlord, finding that the tenant had put on his lock, added another, and let it remain several days. Then (we may suppose), taking off his own, he violently broke open the house, and took therefrom the property which he had purchased. We cannot discover that, in all this time, he had demanded possession of the subject-matter of his purchase, and no reason appears why he should have used the violence that he did to obtain possession. We think that his conduct in this transaction was also the subject-matter of an award for punitive damages.

3. The landlord proposed to show by evidence that, in breaking open the house which contained the goods he had purchased, he acted under the advice of counsel; but he did not offer to prove that, in obtaining that advice, he had submitted to counsel the real facts of the case, or such as were material to the question upon which counsel was consulted. The code, section 3066, declares that "in every tort there may be aggravating circumstances, either in the act or the intention; and in that event, the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." This being a case in which exemplary damages might be awarded, we have no doubt that in mitigation of those damages the advice of counsel was admissible: 1 Sutherland on Damages, 747; *Cochran v. Tuttle*, 75 Ill. 361; compare *Jasper v. Purnell*, 67 Id. 358. Wherever intention is involved as an element of aggravation, advice of counsel is pertinent, although not receivable as matter of justification: Code, sec. 410. Advice of counsel to withdraw claim to avoid damages: *Perkins v. Attaway*, 14 Ga. 27. Motive for entering an appeal: *Gilmore v. Wright*, 20 Id. 199; *Hartridge v. McDaniel*, 20 Id. 398. Excuse by sheriff on rule: *Green v. Jones*, 39 Id. 521; *Harrell v. Feagin*, 59 Id. 821. As to suing out distress warrant: *Dye v. Denham*, 54 Id. 224. Malicious prosecution: *Fox v. Davis*, 55 Id. 299; *Ventress v. Rosser*, 73 Id. 535. Suing out attach-

ment maliciously and without probable cause: *McLaren v. Birdsong*, 24 Id. 271. *Contra* as to fraudulent conveyance: *Smith v. Wellborn*, 75 Id. 800.

The offer to prove advice, to be available, should embrace an offer to show that the advice sought and given was based on the actual case: 1 Hilliard on Torts, 437, 438.

Judgment affirmed.

LANDLORD AND TENANT. — Where a tenant holds over, and the landlord enters by force and turns him out, the landlord is not liable for trespass: *Hyatt v. Wood*, 4 Johns. 150; 4 Am. Dec. 258.

DAMAGES, EXEMPLARY OR PUNITIVE, WHEN RECOVERABLE: See *Beece v. Southworth*, 71 Tex. 765; 10 Am. St. Rep. 814, and cases cited in note 818; *Stutz v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and notes; *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630, and cases collected in note 632; *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note 521, 522.

PEAVY v. GEORGIA RAILROAD AND BANKING CO.

[81 GEORGIA, 485.]

WITH OR WITHOUT A TICKET, A PASSENGER HAS NO RIGHT TO REMAIN ON A TRAIN and be carried when he is disorderly, or uses any obscene, profane, or vulgar language.

IF A DISORDERLY PASSENGER DEFILES THE CONDUCTOR, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train, and if after expulsion he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict, even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting. It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty.

T. E. Watson, J. S. Battle, J. S. Gross, and J. W. Hixon, for the plaintiff.

J. B. Cumming, W. M. and M. P. Reese, and James Whitehead, for the defendant.

BLECKLEY, C. J. The plaintiff sued upon two causes of action: 1. Expulsion from the cars; and 2. The shooting of him by the conductor. There have been two trials. In the first he obtained a verdict of \$1,500; in the second, for \$2,250. The presiding judge, on each occasion, set aside the verdict, at the instance of the defendant, and granted a new trial. The second grant of a new trial is what we are now called upon to review.

1. The code, section 4586 a, declares that "when a passenger is guilty of disorderly conduct, or uses any obscene, profane, or vulgar language, . . . upon any passenger train, the conductor of such train may stop his train at the place where such offense is committed, or at the next stopping-place of such train, and eject such passenger from the train, using only such force as may be necessary to accomplish such removal; and the conductors may command the assistance of the employees of the company and of the passengers on such train to assist in such removal."

The plaintiff, with several drinks in his bosom and a pistol in his possession, got upon a passenger train, and the first thing he did on reaching the platform was to use profane language. The conductor, being near by and hearing him, approached and either took him by the collar or touched him on the shoulder, and admonished him not to swear. They had some conversation, and the plaintiff, with the conductor's assent, went into a car and took a seat. While there, the conductor coming in for the purpose of collecting fare or taking up tickets, the conversation between them was renewed, in which the plaintiff again cursed and used obscene language. According to the weight of the testimony (and to any one not under the sway of interest or the spell of eloquence, it is plain what the truth of the case is), he was profane, obscene, and disorderly, and upon the conductor's trying to put him off the train, he drew a pistol. He had already said that if the conductor attempted to put him off, they would see which one "hit the ditch" first. The conductor retired, borrowed a pistol from a passenger (a sheriff on board who had a prisoner in custody), and then came up and presented his pistol, forced the plaintiff to lower his hand, and backed him off the train. When the plaintiff reached the ground, the conductor shook his pistol in his face, and told him that if he got on the train any more he would get hurt.

If nothing else had occurred, there would have been no shooting. The conductor, up to this point, was unquestionably justifiable in what he did. But the plaintiff, after being expelled from the train, and being thus admonished by the conductor, replied with grossly vituperative obscenity and profanity. His expression, as he repeats it himself in the evidence, is too foul and repulsive to be reproduced in this opinion. The moment he gave this filthy insult, the conductor shot at him, hitting him in the shoulder, and about the

same time the plaintiff shot at the conductor, and they exchanged five shots, the conductor hitting three times, and not being hit at all.

According to the plaintiff's witness Hill, after the shooting was over the plaintiff walked up and said to the conductor if he got off the train he would whip him. The conductor went back in the car to get another pistol, and while he was endeavoring to do so, some one pulled the bell-rope and the train moved off. The plaintiff, however, as it moved off, attempted to board it again, and his witness, Hill, pushed him off, telling him that if he got on the conductor would kill him. The last seen of him was by a passenger, as the train moved away, standing upon the track waving his pistol. There can be no doubt that his use of profane and obscene language, and his disorderly conduct generally, warranted the conductor in expelling him from the train. He certainly had no cause of action for that.

2. Did he have a cause of action for the shooting? But for his fault, the conductor would not have been brought into a state of excitement from danger and insult which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company; because the plaintiff was there upon the ground, stirring up excitement and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune; and though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was in no fault for it, and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law (as we can well infer) by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol, and presenting it at him, and violating the law by general disorder and misconduct throughout the transaction

up to the moment he was shot. We think the court below was well warranted in granting the second new trial. While a second verdict is a sacred thing, it is less sacred than the law and the substantial justice of the case. These required that another new trial should be granted.

Judgment affirmed.

MASTER AND SERVANT. — Liability of master for tortious acts of servant: See *Chicago etc. Ry Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380, and note 383; *Williams v. Pullman Pal. Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512, and note 519; *Hussey v. Railroad Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note 317, with cases therein cited.

ALEXANDER v. SEARCY.

[81 GEORGIA, 536.]

CORPORATIONS — STOCK AND STOCKHOLDERS — EQUITY — LACHES. — While a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, or others who participate therein, the minority stockholders, when they have been injured or damaged by such acts, must act promptly, and not wait an unreasonable time. If they postpone their complaint for an unreasonable time, as from seven to fifteen years, they forfeit their right to equitable relief.

CORPORATIONS — STOCK AND STOCKHOLDERS — ACQUIESCENCE — LACHES. — Though purchasing, owning, and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public is concerned, still a stockholder who has acquiesced therein for fifteen years, and received money from the corporation by reason of the illegal act, is not allowed to raise that question. His acquiescence does not render valid the illegal act, but prevents him from taking advantage of its illegality. The public or the state is not thus bound.

CORPORATIONS — STOCK AND STOCKHOLDERS. — Holders of a majority of the stock in a corporation have a right to control it, and the minority cannot interfere therewith unless they show some good reason for interference. They must establish by their complaint that they have exhausted all the means within their power to obtain redress for their grievances or action in conformity with their wishes, and that their effort to obtain redress at the hands of the other directors and stockholders has been earnest and faithful.

CORPORATIONS — STOCK AND STOCKHOLDERS. — A person who did not own stock at the time of fraudulent transactions complained of, or whose shares have not devolved upon him since by operation of law, cannot maintain a suit to have such transactions declared illegal.

Lawton and Cunningham, R. F. Lyon, and John I. Hall, for the plaintiff in error.

A. M. Speer, Clifford Anderson, E. W. Hammond, and F. D. Dismuke, contra.

SIMMONS, J. It appears from the record in this case that in the year 1871 the Savannah, Griffin, and North Alabama Railroad Company made and executed a deed of trust or mortgage on its railroad or other property to William M. Wadley, president of the Central Railroad and Banking Company of Georgia, and his successors in office, and William B. Johnston, as trustees, to secure the principal and interest of five hundred thousand dollars' worth of bonds which said Savannah, Griffin, and North Alabama Railroad Company was about to issue. These bonds were issued; and in the course of time the major part of them came into the possession of the Central Railroad and Banking Company. It further appears that the Savannah, Griffin, and North Alabama Railroad Company had defaulted in the payment of interest on these bonds for several years. The deed of trust or mortgage contained a clause authorizing the trustees to foreclose the mortgage in case of such default. Wadley, one of the trustees named in the deed, died, and Alexander, the plaintiff in error here, became his successor as president of said Central Railroad and Banking Company, and his successor in this trust, under the terms of the mortgage. In 1887, he and Johnston, the other trustee, filed their bill to foreclose this mortgage. Johnston died pending the suit, and Alexander thus became the sole complainant. After the appearance term of the case, and before the trial term, Searcy and others, as stockholders of the Savannah, Griffin, and North Alabama Railroad Company, filed their bill against said Alexander, trustee, the Savannah, Griffin, and North Alabama Railroad Company, and the Central Railroad and Banking Company, wherein they allege that they are stockholders of the Savannah, Griffin, and North Alabama Railroad Company; that they own about four hundred shares of the capital stock thereof; and that the Central Railroad and Banking Company owns a majority of the stock of said Savannah, Griffin, and North Alabama Railroad Company, and likewise the bonds issued by said company as aforesaid. They further allege that by reason of the Central's said ownership of a majority of the stock, it has had the control of the Savannah, Griffin, and North Alabama railroad since 1872, and by reason of having such control, has placed its own directors on the board of directors of the Savan-

nan, Griffin, and North Alabama Railroad Company, and that it has purposely mismanaged said Savannah, Griffin, and North Alabama railroad by cutting off its through-freights, and sending them over the Atlanta and West Point railroad, a road in which the Central also had an interest; by building a depot in the town of Carrollton, much more costly and extensive than the business of the road required; and by placing the net income earned by the Savannah, Griffin, and North Alabama railroad upon its road-bed in the way of improvements,—all of which has greatly injured and damaged the stockholders of the said Savannah, Griffin, and North Alabama Railroad Company. They also allege that the bonds of the Savannah, Griffin, and North Alabama Railroad Company were purchased below par by the Macon and Western Railroad Company (which, by an act of the legislature, was afterwards consolidated with the Central Railroad and Banking Company), which latter company now owns said bonds, and is seeking to recover the full value thereof and interest thereon, besides interest on the unpaid coupons.

They allege that the purchase of these bonds at sixty-five or seventy cents on the dollar was a usurious transaction, and that the Central Railroad and Banking Company ought not to be allowed to recover the face value thereof, and interest on the same; that if it can recover at all, it can only be allowed to recover the amount it paid for the bonds, with the legal interest on that amount. They further allege that neither the said Macon and Western Railroad Company, nor the Central, had the power, under their charters, to own or purchase the stock of the Savannah, Griffin, and North Alabama Railroad Company; that the purchase of said stock was *ultra vires*, and void. They also allege that the president of the Central Railroad and Banking Company was a director of the Savannah, Griffin, and North Alabama Railroad Company, and was president of the former company when the stock of the Savannah, Griffin, and North Alabama Railroad Company was sold to it, and that this rendered the contract illegal and void. They prayed for an accounting between the Central and the Savannah, Griffin, and North Alabama Railroad Company as to the damages incurred by the latter road by reason of the mismanagement thereof, insisting that when such damages were assessed they should be credited upon the bonds held by the Central, and that such damages would be sufficient to pay off all the legal interest due on said bonds. They also prayed

that an accounting be had as to the usury sought to be collected by the Central, and that the usury be deducted from said bonds, and that the Central be enjoined from disposing of any of said bonds. They prayed the appointment of a receiver to take charge of and manage said Savannah, Griffin, and North Alabama railroad, under the direction of the court. They further prayed that the ownership of the stock of the Savannah, Griffin, and North Alabama Railroad Company by the Central Railroad and Banking Company be decreed to be *ultra vires*, and null and void.

Alexander, the trustee, answered said bill, but it is unnecessary to notice his answer, as it is not material to the decision of this case.

The Central Railroad and Banking Company showed cause against the granting of the injunction by demurrer and answer. The second and third grounds of the demurrer are as follows:—

“2. Because the complainants do not show by their bill any right to prosecute this suit on behalf of the minority stockholders, it not being alleged that the directors of the Savannah, Griffin, and North Alabama railroad have ever been requested to make such defense, or that they have ever refused or declined to make such defense.

“3. Because the complainants, if they have any cause of complaint or grounds of equity, have not made such complaint within a reasonable time, but have, after full knowledge of all such grounds of complaint, or a full opportunity to acquire notice thereof, acquiesced in such acts of alleged error for more than four years.”

The answer shows that the complainant Searcy owns 296 shares of the capital stock of the Savannah, Griffin, and North Alabama Railroad Company, which were acquired by him since the beginning of this litigation; and that the other complainants owned their stock from ten to fifteen years before the beginning of the litigation. It denies all the charges made in the bill as to the mismanagement of the road, and insists that the road was managed according to the best judgment of the officers and board of directors thereof. It admits owning the stock and bonds of said railroad, and alleges that the purchase thereof was made by the board of directors of the Central with the full knowledge of all the stockholders of the Savannah, Griffin, and North Alabama Railroad Company; that the matter was laid before said stockholders by the presi-

dent of their company; and that by a vote of said stockholders they authorized their said president to sell said bonds and stock to the Central Railroad and Banking Company, upon certain conditions named in the resolution. The answer also goes into a detailed account of the management of the Savannah, Griffin, and North Alabama railroad, giving the facts as to its management, and the earnings of the road year by year. It denies that there was any usury in the transaction of the purchase of the bonds, claiming that it did not lend any money to the Savannah, Griffin, and North Alabama Railroad Company; that the bonds were purchased by it in open market, and the full market price paid therefor. Under the view we take of this case, it is unnecessary to go further into the details of the answer.

On the hearing, the chancellor granted the injunction prayed for, and appointed a receiver to take charge of the Savannah, Griffin, and North Alabama railroad. To this decision, Alexander, the trustee, the Savannah, Griffin, and North Alabama Railroad Company, and the Central Railroad and Banking Company, excepted.

1. We think the court erred in granting this injunction and appointing a receiver. The record shows that the alleged illegal transactions complained of by these minority stockholders commenced in 1870, and continued from that time up to the filing of this bill. A part of this stock was purchased by the Macon and Western Railroad Company prior to 1870. Reports were made of the sale by the president of the Savannah, Griffin, and North Alabama Railroad Company to the board of directors and the stockholders thereof. The purchase by the Central Railroad and Banking Company was made subsequently, and of this purchase the board of directors and the stockholders of the Savannah, Griffin, and North Alabama Railroad Company were also notified at the annual meetings of the stockholders. The transfers of the stock to the Macon and Western Railroad Company, and the Central Railroad and Banking Company, were made on the books of the company, to which every stockholder had access. This stock was voted at the annual meetings by the Macon and Western Railroad Company, and when the Macon and Western was consolidated with the Central, the same stock and other stock purchased by the Central was voted at every annual meeting by the Central; so that there can be no doubt that each and every stockholder of the Savannah, Griffin, and North Alabama Railroad

Company had full knowledge that the Central Railroad and Banking Company owned the stock, and that it voted it at every meeting of the stockholders. The exercise of this right commenced on the part of the Central as early as the year 1878, and from that time to November, 1887, it claimed and exercised the right to vote this stock. The Macon and Western Railroad Company and the Central Railroad and Banking Company have expended large sums of money in building and equipping the Savannah, Griffin, and North Alabama railroad. Yet these stockholders, at each meeting, when these facts were laid before them, kept silent. They made no objection to receiving this money from the Macon and Western Railroad Company, and the Central Railroad and Banking Company; but agreed in every instance to accept their money. They stood by and saw the Central expend large sums in building and equipping this road, and yet not a word of objection did they utter. They stood by and saw this stock issued to the Macon and Western Railroad Company, and to the Central, in payment of large sums of money advanced to them by these companies, and not only stood by and saw this done, but helped by their votes to do it; because, as said before, it was all done by resolution of the stockholders at their meetings.

In our opinion, whether the Macon and Western, or the Central after the Macon and Western was consolidated with it, had power and authority under their charters, or not, to purchase and own stock in another railroad company, these stockholders cannot now complain. They have acquiesced in this illegal act, if it is illegal, in some instances for seven years, and in others for fifteen, the stock having been purchased at divers times from 1869 to 1880, they have received the money of these corporations; and after acquiescence for that length of time, with a full knowledge of the facts, equity will not allow them to complain. This is a familiar doctrine in courts of equity. Cook, in his work on stockholders, section 686, says: "After a stockholder has knowledge, or is chargeable with knowledge, of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter. As to what will constitute a reasonable time depends on the circumstances of the case. If it is evident that the stockholder is waiting to see whether the unauthorized act will be profitable to the corporation, the court will refuse to grant him any relief. So, also, if the stock-

holder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made, before he brings suit, he is guilty of laches, and his remedy is barred. In like manner, where the stockholder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter. And in general, where it is clear that the stockholder had a full knowledge of all the essential facts of an act which he might bring a suit to remedy, but which for an unreasonable length of time he fails to object to by a bill in equity, he will be held guilty of laches, and his right to institute the suit is barred."

In *Taylor v. South etc. R'y Co.*, 4 Woods, .575, the court says: "A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is *ultra vires* and in excess of the corporate powers granted by the charter of the corporation."

In the case of *Houldsworth v. Evans*, L. R. 3 H. L. 263, it is said: "Where the summary interference of this court is invoked in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made, in contravention of the rights for which they contend, cannot call upon this court for its summary interference."

In *Stewart v. Eris etc. Transportation Co.*, 17 Minn. 372, the court said: "If a stockholder assents to acts *ultra vires*, or, although not originally or expressly assenting, has for an unreasonable time acquiesced and has permitted them to go unquestioned, so that other parties who have acted upon the faith of them (as, for instance, by making large expenditures of money), would suffer great injury from their repudiation, a court of equity would not easily be induced to grant relief at the instance of such stockholder."

In the case of *Peabody v. Flint*, 88 Mass. 54, a delay of three and a half years was held to be a bar. In the case of *Gregory v. Patchett*, 33 Beav. 595, six years were held to be a bar. In the case of *Ashurst's Appeal*, 60 Pa. St. 290, seven years were held to be a bar. In the case of *Dimpfell v. Ohio etc. R. R. Co.*, 110 U. S. 209, three years and eight months were held to be a bar. The general rule which we deduce from these authorities and others which we might cite is, that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against a corporation,

its officers and others who participate therein when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief. "Nothing will call a court of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing": *Smith v. Clay*, 3 Bro. C. C. 639, note.

This view is not in conflict with the cases of *Central R. R. Co. v. Collins*, 40 Ga. 582, and *Hazlehurst v. Savannah etc. R. R. Co.*, 43 Id. 13, cited in the argument, as the stockholders in those cases filed their bills promptly.

But it is alleged by counsel for the defendants in error that no amount of acquiescence on the part of the stockholders will make an act legal which is illegal; in other words, that no amount of acquiescence on the part of the stockholders would give power to the Central Railroad and Banking Company to purchase and own stock in another railroad, if the law did not authorize it. We concede that. But in our opinion, it does not follow that, because a railroad has no power to purchase or own stock in another railroad company, a stockholder who has acquiesced therein for fifteen years should have a right to object. It may be true, and doubtless is, that no assent or acquiescence of the stockholders can validate such an act; but it is a different question whether, after such a long acquiescence, the stockholder may take advantage of the invalidity of such acts: Cook on the Law of Stock and Stockholders, sec. 683. The act of purchasing and owning and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public are concerned; but we do not think that a stockholder, who has acquiesced for fifteen years, and who has received money from the corporation by reason of the illegal act, should be allowed to make that question. His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity. The public or the state is not thus bound. The state, through its proper officer, may, at any time, commence proceedings to prevent it or to declare it *ultra vires* and illegal.

2. We think the chancellor erred in granting this injunction, for another reason. This is a bill filed by a few persons, owning about four hundred shares out of the ten thousand

shares constituting the capital stock of this company. The Central Railroad and Banking Company owns somewhat over six thousand shares of the capital stock, and the remainder of the shares are owned by individuals.

The general rule of law is, that the holders of a majority of the stock shall control the corporation, and the minority cannot interfere therewith unless they show some good reason for interference. These complainants nowhere allege in their bill that they ever made a demand on the board of directors to defend this suit, or that the board of directors had refused to defend it. Nowhere in their bill do they set up any excuse or reason for filing the same, except that they say they would have called on the officials in charge of the Savannah, Griffin, and North Alabama railroad to make a defense to said foreclosure proceedings but for the facts aforesaid, which show that they were in collusion with the parties seeking to foreclose the mortgage; and in order to make such defense, they would have to accuse themselves of misconduct and fraud on the rights of the complainants. They do not allege that they applied to the board of directors or to the stockholders, but that it was the officials of the road to whom they would have applied if they had not been in collusion with the Central Railroad and Banking Company. That is not sufficient, in our opinion. The rule is well settled by a great number of adjudicated cases in the highest courts; among them, in the able opinion of Mr. Justice Miller in *Hawes v. Oakland*, 104 U. S. 450, where it is held that before a minority of the stockholders can maintain a bill against the majority, there must be shown,—1. Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter or the law under which the company was organized; or 2. Such a fraudulent transaction, completed or threatened by them, either among themselves or with some other party, or with share-holders, as will result in serious injury to the company or the other share-holders; or 3. That the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company or of the rights of the other share-holders; or 4. That the majority of the stockholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other share-holders, which can only be restrained by a court of equity; and 5. It must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors

and share-holders of the corporation, etc. In the opinion of the court the learned justice says: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the share-holder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the share-holders when that is necessary, and the cause of failure in these efforts, should be stated with particularity."

This case was cited and approved in *Dimpfell v. Ohio etc. R. R. Co.*, 110 U. S. 209, where Mr. Justice Field, in delivering the opinion of the court, says: "A stockholder must make a better showing of wrongs which he has suffered, and also of efforts to obtain relief against them, before a court of equity will interfere and set aside the transaction of a railway company or of its directors. It is not enough that there may be a doubt as to the authority of the directors, or as to the wisdom of their proceedings. Grievances, real and substantial, must exist; and before an individual stockholder can be heard, he must show, in the language of this court, that 'he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes' (citing *Hawes v. Oakland*, *supra*). In that case, the court added that the efforts to induce such action as he desired on the part of the directors, or of the stockholders when that was necessary, and the cause of his failure, should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law."

We have shown that no allegations of this sort were made by the complainants in this case. As said before, no request or demand was made of the directors, and no reason is given why such demand was not made on the directors. No reason was stated in this bill why they should be entitled to file it, except that the officers of the Savannah, Griffin, and North Alabama Railroad Company were in collusion with the officers of the Central Railroad and Banking Company. It seems to us that if they had applied to men of such character and standing as those who constituted their board of directors, viz., John D. Stewart, U. B. Wilkinson, A. D. Freeman, W. W. Merrill, J. U. Horne, H. J. Sargent, W. W. Fitts, and Arthur Hutchinson, and had even intimated wrongful and fraudulent acts on the part of the Central Railroad and Banking Company, and had asked them to investigate the matter, they would certainly have done so. But they fail to allege that they called on these men to do their duty as directors over this separate and independent organization, and simply allege, in effect, that they were mere puppets of the Central Railroad and Banking Company. We are satisfied that if these defenses to the foreclosure of the mortgage have any merit in them, and these complainants show any good reason to the directors why they should do so, they will make a defense.

3. There is one other reason, to my mind, why these complainants should be held to strict allegations in their bill; and that is the fact, already stated, that out of the ten thousand shares of capital stock in this company they own only about four hundred. The holders of between three and four thousand shares, who are not connected with the Central Railroad and Banking Company, as appears from this record, make no complaint against the foreclosure of the mortgage; and of the holders of these four hundred shares who do make complaint, one of them owns nearly three hundred shares; and the record discloses that he purchased them after this litigation began. The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of cannot complain or bring a suit to have them declared illegal.

In the case of *Hawes v. Oakland*, 104 U. S. 450, it is said that the bill must allege that the complainant was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law. And this is reiterated in *Dimpfell v. Ohio etc. R. R. Co.*, 110 Id. 209, in which case Mr. Justice Field says, in speak-

ing of the complainant's efforts to induce the directors or stockholders of the corporation to begin suit: "The cause of his failure should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law." See, *contra*, Wait on Insolvent Corporations, sec. 628, and authorities there cited.

We therefore hold that these minority stockholders who filed this bill, not having applied to the directors of the railroad company of which they are stockholders, nor given any reason for their failure to make this application to the directors or stockholders to defend these suits, cannot, of their own motion, make these defenses, either on account of the mismanagement of the road, or on account of the usury in the transaction, if there be any usury.

Judgment reversed.

LACHES. — Equity refuses its aid, after the lapse of a considerable length of time, where there has been a want of a reasonable amount of diligence upon the part of him seeking relief: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and particularly cases cited in note 530-531; compare *Fisk v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638, and note 642. For the law as to the subject of laches, see note to *Bell v. Hudson*, 2 Id. 800-808; *Wright v. Fisher*, 65 Mich. 279; 8 Am. St. Rep. 886.

GRANT v. KUGLAR.

[81 GEORGIA, 687.]

WHERE A STREAM FLOWS THROUGH TWO ADJOINING TRACTS OF LAND, the property of different owners, and in the bed of the stream on the upper tract there was a natural ledge of rock, which retarded the flow of the water so as to protect the lower tract from overflow, the proprietor of the upper tract had no right to remove such ledge of rock, and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions of the same, which but for the alteration would not be so affected. And this is true, although there be no damage at the point where the stream enters the lower tract, but only farther down.

DAMAGES for diversion of watercourse. Plaintiff and defendant are adjoining proprietors, through whose lands a stream of water flows, the defendant being the upper owner. On his land the stream has considerable fall, and in its bed there was a natural ledge of rock, which to some extent obstructed the stream, and completely protected plaintiff's land

from overflow of sand and water. Defendant, in 1883 or 1884, blasted the rock from the bed of the stream, so that the water left the natural channel on plaintiff's land, overflowed it with water and sand, and rendered it useless and worthless during 1884 and 1885, for which he claims damages.

J. H. Turner, E. J. Reagan, and W. A. Brown, for the plaintiff.

Bigby and Dorsey, and J. T. Spence, for the defendant.

BLECKLEY, C. J. The principle upon which we rule this case is, that water having a time relation as well as a space relation, both of them being fixed by nature, there is no more right in an adjacent proprietor to alter the one than the other. If the time relation of the stream is so altered that the effect of the water upon the lower tract is injuriously different from what it was by the natural flow of the stream, then a wrong has been done to the proprietor of the lower tract. We think that the owner of water has no more right, artificially, to project it forward on another man's land than he has to push it back upon land in his rear; and if, by so doing, he causes damage, he ought to answer for it. There may be difficulty in ascertaining from the declaration in this case how the alleged injury could occur consistently with physical laws, but if it be true, as averred, that a casual connection exists between the removal of the ledge of rock and the damage to the lower tract, we can see no legal obstacle to a recovery; and we think the court erred in dismissing the declaration upon demurrer.

It is not easy to find any instance in point, but we think the principle is recognized in certain authorities we have examined, most of them cited in Angell on Watercourses, sections 95 a, 96, 108 e, 108 k, 335. Nothing in our code militates against the view we have presented. We think the code, sections 2327, 2331, 2332, and 3018, makes no substantial change in the common-law rights of land-owners with respect to ditching out and protecting their property; and such, in effect, was the view of the act of 1856 taken by this court in *Persons v. Hill*, 33 Ga. Supp. 141.

Judgment reversed.

WATERCOURSES. — Backing water by means of artificial dams, etc., upon the lands of another is an actionable injury at common law: Note to *Sullens v. Chicago etc. Ry Co.*, 7 Am. St. Rep. 507. A riparian owner is liable in damages for raising the water of a stream above its natural banks, although he prevents the overflow by embankments, if in consequence thereof water percolates through the natural banks so as to overflow the adjoining lands of another: *Pizley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72.

SNIDER v. STATE.

[81 GEORGIA, 782.]

JUDICIAL NOTICE. — That alcohol is an intoxicating, spirituous liquor need not be proved; the court knows it.

LIQUOR LAWS — LICENSE — SELLING INTOXICANT TO MINORS. — Though no license is required of druggists for the sale of alcohol, still as it is a spirituous or intoxicating liquor, no druggist or other person has a right to sell or furnish it to a minor without the written consent of his parent or guardian.

LIQUOR LAWS — PRINCIPAL AND AGENT. — Where one is guilty of a violation of the liquor laws in selling alcohol to a minor, he cannot excuse the crime on the ground that the intoxicant was sold by his clerk, and not by himself.

Alexander and Turnbull, for the plaintiff in error.

Frank M. O'Bryan, for the state.

SIMMONS, J. Snider was convicted in two cases for selling spirituous and intoxicating liquors to minors, and in both cases made motions for a new trial, which were overruled by the court, and he excepted. The proof showed that the defendant sold pure alcohol to two boys on different occasions. The main point argued before us was, that the judge in charging the jury in both cases instructed them that alcohol was a spirituous and intoxicating liquor, and that it was not necessary for the state to prove that it was intoxicating; or in other words, that the court could take judicial cognizance of the fact that alcohol was intoxicating, and could so instruct the jury, without proof that it was intoxicating. Counsel for the plaintiff in error argued that this was an expression of opinion by the court upon the facts of the case, and therefore was error.

1. We do not agree with the learned counsel who argued these cases so ably for the plaintiff in error. That alcohol is an intoxicant is as well known and established as any other physical fact. There is not one man in ten thousand, or a hundred thousand, who, if asked whether alcohol is intoxicating, would not reply immediately in the affirmative. It is not a purely scientific fact; it is a fact that every person of common understanding knows. Indeed, it is a matter of common knowledge that alcohol is the intoxicating element of the various forms of beverages known as "spirituous and intoxicating liquors." It is known by the people generally as well as they know that the sun produces heat, that summer is succeeded by winter, that flowers bloom in the spring, that the earth

revolves, or that the blood circulates in the human system. Would it be necessary, upon the trial of a case where any of these facts were involved, to prove to the jury any one of them? We apprehend no lawyer would undertake to burden the record of a case with such proof. If, therefore, it be unnecessary to prove any of these well-known physical facts, why should it be necessary to prove the equally well-known fact that alcohol is an intoxicant?

In the case of *Briffit v. State*, 58 Wis. 42, 46 Am. Rep. 621, the defendant was indicted for selling intoxicating liquors without first having obtained a license therefor. The proof was that he sold beer. The question before the court was, whether proof that the defendant had sold beer was sufficient proof that he had sold malt and intoxicating liquor. Orton, J., in delivering the opinion of the court, said: "At the present time we all know that this malt liquor, under the generic name of 'beer,' is made and used in most of European countries, and in our own, and is a common beverage. As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors *per se*; and why? Simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge, courts take judicial notice that certain things are verities, without proof; as in *Chambers v. George*, 5 Litt. 335, the circulating medium was held to mean 'currency of the state'; and in *Lampton v. Haggard*, 3 T. B. Mon. 149, the circulating medium was held to mean 'Kentucky currency'; and in *Jones v. Overstreet*, 4 Id. 547, the word 'money' was held to mean paper currency. . . . Words in contracts and laws are to be understood in their plain, ordinary, and popular sense, unless they are technical, local, or provincial, or their meaning is modified by the usage of trade: 1 Greenl. Ev., sec. 278. When the general or primary meaning of a word is once established by such common usage and general acceptance, we do not require evidence of its meaning by the testimony of witnesses, but look for its definition in the dictionary."

There are numerous other cases holding that the courts will take judicial knowledge that beer is an intoxicant, and that the fact need not be proved to the jury. It is true that there are authorities in conflict upon the question of whether beer is such a well-known intoxicant as to need no proof of the fact,

some courts holding that it is and others that it is not; but no case was cited, nor have we been able to find any, that holds that it is necessary to prove that alcohol, whisky, brandy, gin, or rum are intoxicants.

In the case of *Commonwealth v. Peckham*, 2 Gray, 514, it was held that "an allegation in an indictment of an unlawful sale of intoxicating liquor is supported by proof of such a sale of gin, without proof that gin is intoxicating." The court say in that case: "Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters. Now, everybody who knows what gin is knows that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor without evidence that it was not a solid substance, as that they could not find that it was intoxicating without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor." If this is a sound rule as to gin, and we think it is, it ought to be more so as applied to alcohol,—“the hoary-headed mother of all intoxicants,” as expressed in the charge of the court below.

Of course, if it is not well known and well recognized by the people generally that a drink is intoxicating, proof of the fact that it is intoxicating should be required. If there is a new drink, or a beverage not so well known, such as “argaric,” “rice-beer,” and other drinks common under prohibition laws, proof that it is an intoxicating liquor would be necessary.

2. It is argued by the plaintiff in error that, under the facts of the case, the defendant ought not to be convicted, because the liquors meant by the statute are liquors sold and used as beverages. It is argued that this is shown by the fact that the city and county authorities have never considered alcohol as among those beverages, and have never required druggists to take out a license for its sale. It may be true, and doubtless is, that no license has ever been required of druggists for the sale of alcohol, but if alcohol is a spirituous or intoxicating liquor, no druggist or any other person has a right to sell it or furnish it to a minor without the written consent of his parent or guardian. The statute declares positively that it shall not be done.

3. It is also claimed that the defendant should not have

been convicted in one of these cases because he did not sell alcohol himself, but it was sold by his clerk. We do not think this makes any difference. The statute is, that "no person or persons, by himself or another, shall sell or cause to be sold, or furnished, or permit any other person or persons in his, her, or their employ, to sell or furnish any minor or minors spirituous or intoxicating or malt liquors of any kind, without first obtaining written authority from the parent or guardian of such minor or minors": Code, sec. 4540 a.

For these reasons, we affirm the judgment of the court below in both cases.

Judgment affirmed.

INTOXICATING LIQUORS. — Courts take judicial notice that beer is a malt and intoxicating liquor: *Briffit v. State*, 58 Wis. 39; 46 Am. Rep. 621; and the nature and character of wines, liquors, and malt liquors are of such general notoriety that courts will take judicial notice thereof in questions arising under statutes restricting their use and sale; and courts take judicial notice that ale and beer are malt and intoxicating liquors: Note to *Lanfear v. Mestier*, 89 Am. Dec. 694, with the cases there collected upon the subject. But courts will not take judicial notice that cider is an intoxicating liquor, but such fact must be found, if at all, by the jury: *Commonwealth v. Reyburg*, 122 Pa. St. 299. And in a recent New York case, it was held, overruling prior holdings to the contrary in that state, that the question as to whether beer is or is not intoxicating is a question of fact for the jury: *Blatz v. Rohrbach*, 116 N. Y. 450. Whether the Kansas statute defining intoxicating liquors as "all liquors and mixtures, by whatever name called, that will produce intoxication" embraces "McLean's Strengthening Cordial and Blood Purifier," a mixture of whisky, syrup of tulu, and syrup of wild cherry, and "Sherman's Prickly Ash Bitters," is a question of fact for the jury: *Intoxicating Liquor Cases*, 25 Kan. 751; 37 Am. Rep. 284. Whether peach cider is an intoxicating beverage is not a matter of law for the court, but is a question of fact for the jury: *City of Topeka v. Zufall*, 40 Kan. 47; *contra*, in Iowa: *State v. Hutchinson*, 72 Iowa, 561.

INTOXICATING LIQUORS, SALES OF — RECENT CASES. — *Generally.* — A pure and simple gift of liquor by one to another, who is not a minor, is not a criminal act; but it becomes criminal when it is intended as a subterfuge to conceal an unlawful sale: *State v. Hutchings*, 74 Iowa, 20. The sale of beer by one who has a permit, to be used in making a drink which is not intoxicating, is a punishable offense in Iowa: *State v. Yager*, 72 Id. 421. The sale of fermented cider by a druggist for the purposes of a beverage is unlawful under the Michigan statutes, if he has not entered into bonds required by law to sell such liquors as beverages, and he did not sell it for mechanical, medicinal, or sacramental purposes, which only he had the right to do without such bonds: *People v. Foster*, 64 Mich. 715. In an indictment under the Maine statutes for selling cider, there must be an averment that the cider was sold as "a beverage, or for tippling purposes": *State v. Dunlap*, 81 Me. 389. The rule exempting a druggist who, in good faith, and upon a physician's prescription, sells liquors without a license as a medicine, will

not be extended to a liquor-dealer selling, under similar circumstances, in good faith: *State v. Dalton*, 101 N. C. 680.

Sales to Minors. — Where a saloon-keeper, at the instigation of one who pays therefor, delivers intoxicating liquors to a minor, he, as well as the person paying for the liquor, is guilty of a misdemeanor under the laws of Indiana: *Topper v. State*, 118 Ind. 110. In North Carolina, no person can authorize a dealer to sell intoxicating liquors to a minor: *State v. Lawrence*, 97 N. C. 492; but a sale to a minor in pursuance of a sale to his mother for her use is not a sale to a minor under the Massachusetts statutes: *O'Connell v. O'Leary*, 145 Mass. 311; compare *Snow v. State*, 50 Ark. 557, as to what is a permission to a minor to play pool in a saloon. Although a father may have directed a saloon-keeper to send him liquor by his minor child, and such saloon-keeper was indicted for selling to such child liquor which the minor himself bought for himself, and drank at the bar, the fact that the father had instructed the saloon-keeper to send liquor to him through his minor child is no defense: *Boatright v. State*, 77 Ga. 717; compare *Commonwealth v. Fowler*, 145 Mass. 398. In Arkansas, a father may, by written order, give a dealer permission to continuously sell liquor to his minor son, which permission is good till revoked: *Mascowitz v. State*, 49 Ark. 170. The rule is, that a pharmacist or dealer is bound to know whether the persons to whom he sells liquors are such as he may lawfully sell to, and the burden is upon him to show that his sales are lawful: *State v. Thompson*, 74 Iowa, 119. So in a prosecution for selling to a minor, it is proper to show that defendant did not act in good faith in believing such minor to be over twenty-one years of age, and a fabrication of evidence may be shown upon the part of the defendant: *Behler v. State*, 112 Ind. 140.

Sales by Agents. — A pharmacist is not only liable for illegal sales of intoxicants by himself, but also for sales made by his clerk within his knowledge: *Whwood v. Page*, 75 Iowa, 228; but an agent who sells intoxicants in violation of law, yet does not receive the purchase-money, is not liable in Iowa in an action by the purchaser to recover the purchase-money: *Schober v. Rosenfield*, 75 Id. 455. Ordinarily, a dealer or druggist is liable for the illegal sales of intoxicants made by a clerk or agent: *Commonwealth v. Perry*, 148 Mass. 160; *Commonwealth v. Lafayette*, 148 Id. 130; *Commonwealth v. Merriam*, 148 Id. 425; and evidence of defendant's previous instructions to his servants not to furnish liquors to those not entitled thereto is immaterial where the particular sale was made with his knowledge and approval: *State v. Mueller*, 38 Minn. 497. But where a wife keeps a house for the illegal sale of liquors, etc., against the will and consent of the husband, he is not liable therefor, no matter whether he used all means in his power to prevent her actions in this particular or not: *Commonwealth v. Hill*, 145 Mass. 305.

Liability of Property Owners for Illegal Sales of Intoxicants Made upon their Leased Premises. — A landlord who leases a house, knowing that it is to be used for the clandestine and illegal selling of intoxicating liquors, or who subsequently aids, advises, or encourages such sales, is guilty of a misdemeanor under the Arkansas statutes; but where the lease was for a lawful purpose, and he merely does not interfere with his tenant's illegal business when he subsequently becomes cognizant thereof, he is not involved in such tenant's guilt: *Crocker v. State*, 49 Ark. 60. Knowledge on the part of the property owners as to the illegal sales of liquor being made upon their premises must be alleged and proven before the property can be subjected to judgments based upon such illegal sales: *Judge v. Flournoy*, 74 Iowa, 164; *Judge v. O'Connor*, 74 Id. 166.

HARRIS v. STATE.

[81 GEORGIA, 752.]

CRIMINAL LAW — LARCENY. — Where one wrongfully and fraudulently represents himself as the agent of another, and thereby gains possession of goods which the party delivers to him with the sole intent that they shall be delivered by him to his alleged principal, and he converts the goods to his own use, he is guilty of larceny.

F. R. Walker, for the plaintiff in error.

F. M. O'Bryan, for the state.

SIMMONS, J. Joe Harris was convicted in the city court of Atlanta of the offense of simple larceny in two cases. He made a motion for a new trial in both cases, on the ground that the verdict was contrary to the evidence. The motion was overruled, and he excepted.

The evidence in substance is as follows: Harris went to the store of J. M. High and also to the store of John Ryan's Sons, and represented to them that he was the agent of Moore and Marsh, to buy certain dry-goods boxes. They sold the boxes, and made out the bill against Moore and Marsh. They did not sell them to Harris, or intend the title of the boxes to go into Harris. They delivered him the possession of the boxes to be carried to Moore and Marsh. He was not the agent of Moore and Marsh, nor did they know anything about his purchasing the boxes from High and Ryan's Sons. Harris sold the boxes, and appropriated the proceeds of the sale to his own use. Counsel for Harris contend that this state of facts does not constitute the crime of simple larceny. We think it does. The rule is, that "if one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. But if, with the like intent, he fraudulently gets leave to take possession only, and takes and converts the whole to himself, he becomes guilty of larceny; because, while his intent is thus to appropriate the property, the consent which he fraudulently obtained covers no more than the possession": 1 Bishop's Crim. Law, sec. 583, and authorities there cited. In this case Harris fraudulently represented to High and Ryan's Sons that he was the agent of Moore and Marsh. They did not sell him the goods, nor did they intend the title

to go into Harris; but they simply delivered him the custody of the goods, to be delivered by him to Moore and Marsh. He having converted the proceeds of the sale of the boxes to his own use, he was guilty of larceny. The title still remained in the vendor. Harris got the custody of the goods wrongfully and fraudulently.

Judgment affirmed.

LARCENY — WHAT CONSTITUTES. — Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*: *Stats v. Gorman*, 2 Nott & McC. 90; 10 Am. Dec. 576; but one is not guilty of larceny who obtains goods fraudulently, unless he obtains them and carries them away with a fraudulent intent: *Blunt v. Commonwealth*, 4 Leigh, 689; 26 Am. Dec. 341; *People v. Call*, 1 Denio, 120; 43 Am. Dec. 655. Larceny defined: See *Commonwealth v. Michelberger*, 119 Pa. St. 254; 4 Am. St. Rep. 642, and note 645. Compare *People v. Raschke*, 73 Cal. 378.

PATTERSON v. GIBSON.

[81 GEORGIA, 802.]

A BOND EXECUTED UNDER THE DURESS OF THE PRINCIPAL is void as to the surety also, if the surety acted without knowledge of the duress; and knowledge of the fact of imprisonment does not necessarily involve knowledge of its want of legality.

IT WAS ERROR TO STRIKE A PLEA SETTING UP A MATERIAL PART OF THIS DEFENSE, to wit, want of knowledge.

SUIT on bond, commenced by Mrs. Besore against Besore as principal and Patterson as surety in a bond conditioned that "whereas Mrs. Besore had filed her libel for divorce and bill *quia timet* against Besore, under which he had been arrested, if he should pay such amount as might from time to time be ordered by the court as alimony and counsel fees to Mrs. Besore, then this bond would be void," etc. Mrs. Besore alleged that an order was passed for alimony and counsel fees, and remained in force for over two years, when a divorce was granted her; that such alimony and counsel fees were only paid for six months, and that a balance was due her, etc. Patterson pleaded that the bond was given by Besore under duress, and that he signed it as surety without knowledge of the duress. The other facts are stated in the opinion.

R. F. Lyon, Bacon and Rutherford, and R. W. Patterson, for the plaintiff in error.

J. H. Hall, and Hardeman and Davis, contra.

BOYNTON, J. The official report of this case shows that a number of exceptions were taken to the rulings made and charge given by the trial judge. The only one we regard as necessary for this court to pass on grows out of the plea and amended plea on the question of duress. The plaintiff in error, defendant in the court below, set up as one of his defenses that his principal was coerced into signing the bond sued on by duress of illegal imprisonment. To this plea he offered an amendment, in which he alleged that the duress of his principal was unknown to him at the time he signed the bond as surety. This amendment was, on motion, disallowed or stricken by the court; and the court also held that the duress of the principal was not an available defense for the surety. Exceptions were taken to these rulings, and the question for our decision is: If the principal signed the obligation sought to be enforced under such duress as would release him from liability thereon, would the duress of the principal be an available defense for the surety if he signed without knowledge of the duress?

The answer to this question is found in the head-note, which was dictated by the learned chief justice of this court. This answer is fully sustained by reason and authority; for "it is of the essence of a contract of suretyship that there should be some one liable as principal, and accordingly, when one party agrees to become responsible for another, the former incurs no obligation as surety if no valid claim ever arises against the principal": Chitty on Contracts, 11th Am. ed., 738. "The contract of suretyship is that whereby one obligates himself to pay the debt of another, in consideration of credit or indulgence or other benefit to his principal, the principal remaining bound therefor": Code, sec. 2148.

It is also a recognized doctrine of the law of surety that whatever discharges the principal also discharges the surety; but this rule does not apply where the surety binds himself knowing he has no remedy over against his principal: Parsons on Bills and Notes, 244. The same general rule is declared in code, section 2149, with this exception thereto: "If, however, the original contract of the principal is invalid from a disability to contract, and this disability was known to the surety, he is still bound." This exception to the general rule is equivalent to declaring that if the principal was under a disability to contract, and this was unknown to the surety, he

would not be bound. Duress is, or rather it imposes, a disability, and if the principal was coerced to make the contract by duress, and this was unknown to the surety, it would release the surety from liability. The following cases, to wit, — *Strong v. Grannis*, 26 Barb. 122; *Osborn v. Robbins*, 36 N. Y. 365; *Thompson v. Lockwood*, 15 Johns. 256; *Lockwood v. Thorne*, 11 N. Y. 171; 62 Am. Dec. 81; *Speake v. United States*, 9 Cranch, 28; *State v. Brantley*, 27 Ala. 44; *Bunnell v. Read*, 21 Conn. 597; *Fisher v. Shattuck*, 17 Pick. 252; *Hawes v. Marchant*, 1 Curt. 136; *United States v. Tinge*, 5 Pet. 129; *Governor v. Williams*, Dud. 244, 245, — sustain the rule “that duress of the principal is an available defense for the surety also.”

The reasons on which these decisions are bottomed are, that duress is illegal, a contract procured by duress is corrupt in its origin, and the wrong-doer should not be allowed to take a benefit from his wrongful act. If there is an essential vice inherent in the contract, such as fraud or duress, the fraud or duress cannot be wiped out and the contract purified by taking security. Besides, if the surety contracts in ignorance of the duress, it materially increases the risk beyond that assumed in the usual course of business of that kind. This doctrine is consistent with the general rule that the liability of the surety depends on a principal being first bound, not only to the obligee, but liable to reimburse the surety for whatever he may pay for him.

We find, however, another long list of cases which hold that duress of the principal is not an available defense for the surety. Of the large number of these cases, we cite only the following: *Hoscomb v. Standing*, Cro. Jac. 187; Bac. Abr., tit. Duress A; Roll. Abr. 124; *Robinson v. Gould*, 11 Cush. 55; *Plummer v. People*, 16 Ill. 358; *McClintick v. Cummins*, 3 Mo-Lean, 158; *Whitefield v. Longfellow*, 13 Me. 146.

In *Hawes v. Marchant*, 1 Curt. 136, Justice Curtis, in reviewing this doctrine as laid down in the leading case of *Hoscomb v. Standing*, *supra*, says: “It has often been assumed to be good law; I am not prepared to say it is not so, though it must be admitted that it may lead to strange consequences in a case where the surety pays the bond and comes back on the principal to indemnify him, and thus the principal is effectually held for a debt which, according to the case in Cro. Jac., does not appear to have been justly due, and which he was forced by duress to render himself liable for to the surety who

at his request enters into the obligation." Justice Paxson, in *Griffith v. Sitgreaves*, 90 Pa. St. 161, after citing most of the authorities herein cited, says: "I have examined these cases with some care, and do not regard them as controlling authority on either side. They depend very much upon the pleadings, or their special circumstances. In all the cases cited, the duress was either upon the party seeking to avoid the contract sued on, or it was known to him." It by no means follows that because the duress of another is not a good plea, and that in some instances it may not even avail as a defense, it cannot be set up successfully in any case. Therefore, where a promissory note was obtained by duress of the maker, and was indorsed in good faith without any knowledge of the duress on the part of the indorser, in a suit by the holder, who was guilty of the duress against the indorser, the latter may set up the duress of the maker as a defense to the action. In 1 Bay, S. C. R. 13, it was held that if the surety signed under the idea that the contract was a valid one, and it was found to be void as against the principal because of duress, it was also void as to the surety. If the principal is discharged from liability by the act of the party procuring the contract, or by the party seeking to enforce it, and this was done without the knowledge of the surety, the surety will also be discharged: Code, sec. 2121; *Phillips v. Solomon*, 42 Ga. 192.

Therefore the conclusion we reach is, that if the bond sued on was executed under duress of the principal, it is void as to the surety also if the surety acted without knowledge of the duress; and knowledge of the fact of imprisonment does not necessarily involve knowledge of its want of legality. Although the surety may have known that his principal was in prison, this would not carry with it knowledge of duress; for the legal presumption would be that the imprisonment was authorized and legal. And if the officer having him in custody demanded a bond with security as a condition precedent to his discharge, the surety would have a right to presume that the officer was not exceeding his authority. If the principal was illegally imprisoned, or imprisoned without authority and held to procure a bond with security, or if legally imprisoned and held until he should give a bond which the officer has no authority to require, and if the element of illegality was unknown to the surety, then he would be discharged. And it was error to

strike the amended plea, which set up a want of knowledge of the duress of his principal.

Judgment reversed.

DURESS — PRINCIPAL AND SURETY. — The defense of duress of the principal cannot be made by the surety against whom no duress was employed: *Oak v. Dustin*, 79 Me. 23; 1 Am. St. Rep. 281; and see Brandt on Suretyship, sec. 5, Baylies on Sureties and Guarantors, 217, 218, for instances when a surety can plead as a defense the duress of his principal.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

DAVIS v. CITY OF CRAWFORDSVILLE.

[119 INDIANA, 1.]

MUNICIPAL CORPORATION IS LIABLE IN DAMAGES FOR COLLECTING WATER IN ARTIFICIAL CHANNELS, and casting it in a body upon the property of another; but it is not liable for consequential damages caused by the grading and improvement of its streets, unless the work is negligently performed.

ACTION for damages. The opinion states the case.

B. Crane and A. B. Anderson, for the appellant.

W. W. Thornton, P. S. Kennedy, and S. C. Kennedy, for the appellee.

ELLIOTT, C. J. Appellant's counsel say that "the theory upon which the complaint is drawn is, that a municipal corporation has no right to collect surface-water in an artificial channel, and cast it in a body upon another's property." The theory is sound; for a municipal corporation is liable in damages if it collects water in an artificial channel and pours it upon the land of another: *City of Evansville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86; *City of Crawfordsville v. Bond*, 98 Ind. 238; *Lipes v. Hand*, 104 Id. 503; *Rice v. City of Evansville*, 108 Id. 7; 58 Am. Rep. 22; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 548; *Pye v. City of Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671, and authorities collected in note. If the complaint embodies this theory, and contains facts supporting it, then the court erred in sustaining the demurrer of the appellee. But the question is, Does the complaint do this? This

question must be determined from the allegations of that pleading. They are, in substance, these: That the city opened new streets, some running parallel with Main Street, and some intersecting it; that it so established the grade of the new streets as to drain and collect the surface-water from a large scope of land in the western part of the city, and divert it from its natural course into Main Street; that the water thus drawn into Main Street, and cast upon the plaintiff's land, was fully four fifths of all the water which now runs through that street, and that it was thus caused to flow upon plaintiff's land, which, before that time, was dry and free from overflow. Our judgment is, that the complaint neither embodies the theory now declared by counsel to be that upon which they base a right to a recovery, nor states facts supporting it. The facts pleaded do no more than supply the basis for the conclusion that the plaintiff suffered an injury from the grading and improvement of the streets of the municipality. They do not, therefore, constitute a cause of action. For many years it has been the settled law of this state that a municipal corporation is not liable for consequential damages caused by the grading and improvement of its streets, unless the work was negligently performed: *Macy v. City of Indianapolis*, 17 Ind. 267; *Weis v. City of Madison*, 75 Id. 241, and cases cited; *Cummins v. City of Seymour*, 79 Id. 491; 41 Am. Rep. 618; *Platter v. City of Seymour*, 86 Ind. 323; *City of North Vernon v. Voegler*, 103 Id. 314; *Rice v. City of Evansville*, 108 Id. 7; 58 Am. Rep. 22.

The trial court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

MUNICIPAL CORPORATIONS — LIABILITY FOR DAMAGES ARISING BY REASON OF CHANGES TO, IMPROVEMENTS IN, OR GRADING STREETS. — A municipality is not responsible for inconvenience or damages consequent upon the improving or grading of its streets, when such grading is done with diligence and care: *Keasy v. City of Louisville*, 4 Dana, 154; 29 Am. Dec. 395; *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89, and note; *Meares v. Commissioners*, 9 Ired. 73; 49 Am. Dec. 412, and note; *Green v. Borough of Reading*, 9 Watts, 382; 36 Am. Dec. 127, and note; *Humes v. Mayor of Knoxville*, 1 Humph. 403; 34 Am. Dec. 657; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357, and note; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; note to *Mayor etc. of Rome v. Omberg*, 73 Am. Dec. 750; *Cummins v. City of Seymour*, 79 Ind. 491; 41 Am. Rep. 618. But in the case of *City of Lafayette v. Nagle*, 113 Ind. 425, it was held that, under the Indiana statutes, municipalities were liable to abutting owners for consequential damages resulting from the change of an established grade of a street; and in *Town Council v.*

McComb, 18 Ohio, 229, 51 Am. Dec. 453, it was held that a municipality was liable for damages to adjacent property by reason of a change of street grades, although such change was strictly within the city's corporate powers, and was made without negligence or malice.

MUNICIPAL CORPORATIONS — LIABILITY FOR DAMAGES FROM WATERS CAUSED BY ACTS OF THE CITY. — A city is not liable for damages to private property by the overflowing of a sewer, caused by its incapacity, resulting from mere error of judgment not amounting to gross negligence: *Rice v. City of Evansville*, 108 Ind. 7; 58 Am. Rep. 22. So city is not liable for damages for so altering the grade of its streets as to turn the surface-water upon adjacent lots, thereby injuring them: *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719; *Mayor of Philadelphia v. Randolph*, 4 Watts & S. 514; 39 Am. Dec. 102. The city of Los Angeles owns the bed of the Los Angeles River, and can control and divert its waters, but is not liable for injury to property of individuals by reason of a sudden overflow of such river: *Moore v. Los Angeles City*, 72 Cal. 287. But a municipality is liable for collecting and gathering up surface-water by artificial means, and casting it upon one's premises in increased quantities to his injury, as by way of sewers or drains: *Pye v. City of Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671, and cases collected in note 673; *Hitchins v. Mayor of Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422. A municipality can acquire the right to turn a stream of water upon the lands of another to the injury thereof only by an exercise of the power of eminent domain: *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50. A city is liable for damages caused by a flow of water into plaintiff's cellar by reason of a change of the street grade: *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520; to the same effect, in substance, is *City of Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591, and note; *City of Aurora v. Reed*, 57 Ill. 29; 11 Am. Rep. 1; *Township of Blakely v. Devine*, 36 Minn. 52.

BARRETT v. CHOEN.

[119 INDIANA, 56.]

PURCHASER OF REAL ESTATE AT ADMINISTRATOR'S SALE ACQUIRES NO TITLE TO CORD-WOOD thereon at the time of the sale, nor to growing crops which were sowed and planted by the heirs of the decedent, or their tenants, after the death of the decedent.

HEIRS NOT BOUND BY STATEMENTS MADE BY ADMINISTRATOR AT SALE, WHEN. — A statement made by an administrator at a sale of the real estate of his intestate, that the crops thereon are not reserved, cannot prejudice the rights of the heirs of the decedent in crops that were sowed and planted by them or their tenants after the intestate's death.

PERSONS MADE PARTIES, AS HEIRS, TO PROCEEDING BY ADMINISTRATOR TO SELL real estate of his intestate are only affected by the proceeding in their capacity as heirs.

GROWING CROPS NOT BELONGING TO VENDOR OF LAND DO NOT PASS by a sale of the land.

T. S. Rollins, J. M. Justice, and O. E. Barrett, for the appellant.

BERKSHIRE, J. The facts of the case, as found in the record, are about these: Charles G. Choen departed this life in Cass County, Indiana, on November 23, 1883, intestate, leaving the appellees Choens as his only legal heirs (Susan Choen being his widow), and seised of the following real estate in said county: All of that part of the southwest quarter of section 8, town 26, range 1 east, that is south of the Southwestern Railroad, except three small pieces carved out of it. Charles G. Choen died intestate, and George W. Flannagan became his administrator. The appellees Dickerson, Donaldson, and Mooney were tenants of the Choens. The administrator filed his petition to sell the said real estate to pay debts, in the Cass circuit court, and such proceedings were had that he obtained an order to sell the same, and on the twenty-third day of June, 1887, he sold it to the appellant, and on the same day, by order of the court, executed to him a deed therefor.

At the time the deed was executed, there was a large quantity of wood on the land, in the cord, and crops, consisting of corn, wheat, and oats, growing on the land, the same having been sowed and planted and were being cultivated by the said tenants.

It appears that the Choens, without permission from the appellant, entered upon the real estate, and removed therefrom a portion of the cord-wood, and were threatening to remove the remainder; that they were claiming the said growing crops, had entered upon said real estate, and cut the wheat, and were threatening to remove the same, and had notified said tenants that the landlord's share of said crops should be paid to them.

The question presented for decision is, To whom do the wood and crops belong,—the appellant or the appellees Choens?

The record does not inform us when the petition to sell was filed,—whether before or after the crops were sowed and planted. In this state of the record, the presumption must be that the petition was filed afterwards. We are not, therefore, called on to decide what the effect would be had the petition been filed before.

Upon the death of their ancestor, the title to the real estate vested at once in the heirs, subject to an equitable lien in favor of creditors in case the personal estate proved insufficient to pay the indebtedness: *Moncrief v. Moncrief*, 78 Ind. 587; *Miller v. Buell*, 92 Id. 482.

The proceedings under the petition, including the order of sale, were, in effect, a foreclosure of the equitable lien resting upon the real estate. The order of the court was necessarily confined to the real estate; the court had no jurisdiction, in the proceedings referred to, to order the sale of personal property, or to determine any question involving personal property, and had it done so, its action would have been *coram non judice*, and therefore void: R. S. 1881, secs. 2336, 2346. The appellant could only acquire title through his purchase and deed; for that was all that was involved in the proceedings and order to sell: *Rogers v. Abbott*, 37 Ind. 138; *Lewis v. Owen*, 64 Id. 446; *Angle v. Speer*, 66 Id. 488; *Runnels v. Kaylor*, 95 Id. 503. The crops in question were personal property: *Lindley v. Kelley*, 42 Id. 294; *Northern v. State*, 1 Id. 113; *Harvey v. Million*, 67 Id. 90. To whom did they belong? To the Choens, necessarily; they were growing upon their lands, had been sowed, planted, and cultivated by their tenants.

There is no element of estoppel in the case. It is true that the fact appears that the administrator stated at the sale that there had been no reservation of the crops, but his statement could not prejudice the appellees. Besides, this was a judicial sale, and the rule *caveat emptor* applied: *Martin v. Beasley*, 49 Ind. 280; *Henderson v. Whiting*, 56 Id. 131. The appellees were parties to the proceedings to sell, but they were only parties in their capacity as heirs. The proceedings could only affect them as heirs: *Compton v. Pruitt*, 88 Id. 171; *Elliott v. Frakes*, 71 Id. 412; *Unfried v. Heberer*, 63 Id. 67. The court made no order to sell the crops, but if it had, its order, for the reasons already given, would have been void. We can imagine no legal reason for the appellant's claim to the cord-wood or crops. In a legal sense, he had no more right to the wood or crops than he had to any other personal property belonging to the appellees.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BERKSHIRE, J. In the preparation of the original opinion, the fact that the record disclosed the date at which the petition to sell was filed was overlooked. The record shows the petition to have been filed on December 24, 1884; that fact, however, will not alter the conclusion announced in the original opinion. The original order to sell the real estate was made October —, 1885, and was for a public sale; on the

second day of May, 1886, the order was changed to an order for a private sale.

The property was sold and conveyed June 27, 1887. At that time the crops over which the controversy arose were growing on the land, but had no existence at the date of the decedent's death. This was a fact of which the purchaser was bound to take notice, and it should not have been overlooked by the administrator when he had the real estate appraised. Ordinarily, as between vendor and vendee, growing crops pass with the freehold, and as a part of the freehold, but this only applies as to growing crops which belong to the vendor. Growing crops belonging to somebody else do not pass. The vendor cannot pass the title to that which does not belong to him. This is a proposition too plain to require the citation of authorities.

The purchaser at the administrator's sale acquired title to the freehold, and to whatever belonged to it at the time of his purchase, but he acquired nothing more. The appellees were not the vendors of the purchasers; he acquired his title from the decedent through the administrator.

The appellees sowed, planted, and cultivated the crops in controversy, and during the time were rightfully in possession of the real estate, and had the right to cultivate it. The crops were therefore no part of the freehold, but personal property belonging to the appellees. Under the circumstances, the appellant had no interest in the crops or claim upon them.

The petition is overruled, with costs.

GROWING CROPS, WHO ENTITLED THERETO AT AN EXECUTION SALE OF LAND: See extended note to *Crews v. Pendleton*, 19 Am. Dec. 752-755. Crops are personalty, and upon the death of the owner, go to his personal representatives; but before maturity, they are not subject to sale under execution, and therefore a purchaser of land at an execution sale acquires thereby no title to the crops then growing thereon: *Kesler v. Cornelison*, 98 N. C. 383.

PETERS BOX AND LUMBER COMPANY v. LESH.

[119 INDIANA, 93.]

SALE TO ONE FRAUDULENTLY PRETENDING TO BE AGENT DOES NOT PASS TITLE WHEN. — Where one, falsely and fraudulently pretending to be the agent of a third person, as such pretended agent, purchases personal property from a vendor, who intends to vest the title in the supposed principal, the sale is void, and vests no title in such pretended agent, and he cannot, by a subsequent sale, confer title to the property upon another.

MEASURE OF DAMAGES IN REPLEVIN. — Where property consisting of lumber and logs comes into the possession of a third person, of whom the owner demands it, the measure of the latter's recovery is the value of the property at the time and place of the demand and refusal, less any additional value it may have had by reason of labor bestowed upon it, in good faith, before the demand was made.

VENDOR OF GOODS NOT ESTOPPED FROM CLAIMING TITLE TO GOODS AS AGAINST PURCHASER FROM IMPOSTOR. — Where the vendor of personal property, acting under the belief that the purchaser is the agent of another, and that he is selling it to the latter, and, basing his belief upon the representations of the fraudulent purchaser that he is such agent, permits the bill of lading to be made out in the name of such supposed agent, he is not thereby estopped from claiming title to the property as against a purchaser from such supposed agent.

REPLEVIN. The opinion states the case.

A. Zollars, H. Colerick, and W. S. Oppenheim, for the appellant.

T. E. Ellison and F. W. Rawles, for the appellees.

COFFEY, J. This action was brought by the appellees against the appellant, in the Allen circuit court, to recover certain lumber and logs described in the complaint. The cause was put at issue by a general denial, and the venue was changed to the Huntington circuit court. The cause was tried by a jury, who returned a verdict for the appellees, assessing the value of the property at \$207. Motion for a new trial overruled and excepted to, and judgment on the verdict.

The errors assigned in this court are: 1. That the Huntington circuit court had no jurisdiction over the cause; 2. That the court erred in overruling the motion for a new trial.

No point is made in the brief of counsel for the appellant on the first assignment of error, and therefore the same is waived.

The evidence on the part of the appellees tends to prove that the appellant is a corporation, carrying on a large saw-

mill and lumber business at the city of Fort Wayne, Indiana; that the appellees, in November, 1883, had been and were operating a saw-mill at Sidney, Kosciusko County, Indiana; that a man, calling himself Milliard, came to Sidney and represented to the appellees that he was the agent of the appellant, to buy lumber and logs for it; the appellant had, before that, to the knowledge of the appellees, bought such property in that vicinity, and they supposed he was such agent. One of the appellees went with the said Milliard to several places where he bought logs for the appellant, and they finally sold him, as the agent of appellant, the property in question for \$263. By their agreement it was to be measured, put on the cars, the measurement to be sent to the appellant, and it to immediately pay the bill by a draft on New York. The property was measured, sold, and shipped on Monday, and Milliard left Fort Wayne on Tuesday. The draft not coming, one of the appellees went to Fort Wayne on Tuesday, where he met Mr. Papa, the appellant's president, and asked him to pay for said property. Papa denied the authority of Milliard to act for the appellant, and, after demand, refused to deliver the property, and also refused to say much about the contract of appellant with Milliard, or to say how much he had been paid for the property. The appellant did, in fact, pay Milliard \$125 for the property in controversy. Immediately after the delivery of the property to it by Milliard, the appellant commenced to saw up the logs and mix the lumber with its own.

Up to this point there seems to be no disagreement about the facts. It is claimed by the appellant that bills of lading were made out for the property in the name of Milliard, with the consent of one of the appellees, but this fact is disputed by the appellees, who claim that there was nothing made out at the freight-office from which the property was shipped, except a receipt for the property.

The court gave to the jury the following instruction: "Should you find, from the evidence, that the title and right to possession of the property in controversy is in the plaintiffs, and if you further find that the defendant, in the purchase of said property, was in no fault, then you should find the value of said property at what you believe was its fair market value in the condition and place it was situated when the plaintiff demanded the same of the defendant, if such demand were made, exclusive of any expenses or labor the defendant may

have invested in manufacturing the same into lumber up to the time said demand was made; but if the evidence shows defendant knew, or ought to have known, that Milliard was not the real owner, then you should not take into consideration any expense or labor the defendant put upon said logs and lumber, but give the plaintiffs a verdict for the full value at the time and place it was demanded, and in its condition then." To the giving of this instruction the appellant excepted.

The court had previously instructed the jury substantially, that if Milliard had represented himself to the appellees as the agent of the appellant, and they, relying on such representation, sold him the property in controversy, as such agent, without any intention of vesting the title in him, but intending to vest it in the appellant, when he was in fact not the agent of the appellant, such sale was void, and vested no title in Milliard, and he could not, by a subsequent sale, vest title to the property in the appellant.

This case comes clearly within the law as enunciated in the case of *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180. It is there distinctly decided that in a case like this no title passes to the fraudulent purchaser, and that such purchaser cannot, by any subsequent sale, transfer title to another, for the reason that he has none to transfer. It must be true, then, that at the time the appellees demanded possession of the property of the appellant at Fort Wayne, the title was in them, as well as the right to the possession. It was the duty of the appellant to surrender to them such possession; and upon its failure or refusal to do so, what were they entitled to recover?

It is earnestly contended by the learned counsel for the appellant that as the freight from Sidney to Fort Wayne was paid by the appellant, the measure of the appellees' damages was the value of the property at Sidney. But it must be remembered that the appellant did not purchase the property at Sidney. It was purchased at Fort Wayne, and the appellant must be presumed to have taken into consideration the amount he would be compelled to pay to obtain possession of the property in fixing its value at the time of the purchase. It certainly will not be contended that the appellant could refuse to deliver the possession upon demand, because it had paid the freight; nor can it be successfully claimed that Milliard, the fraudulent purchaser, could claim to have the freight refunded

to him, if he had been caught at Fort Wayne before he had disposed of the property. Section 572, Revised Statutes of 1881, provides that in actions to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and for damages for the detention thereof.

It is not denied that at the time of the demand the appellant had the property in controversy, and that it could have delivered it to the appellees. By refusing to do so we think it became liable to the appellees for the value of such property at the time and place of such demand and refusal, less any additional value it may have had by reason of labor bestowed upon it, in good faith, before such demand was made: *Mitchell v. Burch*, 36 Ind. 529; Wells on Replevin, secs. 549, 563; *Cushing v. Longfellow*, 26 Me. 308.

It is claimed that in actions for trover the rule is different; but as this is an action of replevin, we need not, and in fact do not, decide that question.

It is earnestly insisted by the learned counsel for the appellant, that as the appellees permitted Milliard to take bills of lading in his name, and thus enabled him to sell the property to an innocent purchaser for full value, they are now estopped from claiming the property in controversy in the hands of the appellant. Instructions were given by the court, and others asked by the appellant and refused, which fairly raise this question.

The court instructed the jury that if Milliard had the bills of lading made out in his own name, as the consignor, to enable him to fraudulently sell the same to the defendant, and the plaintiffs knew that the property was so shipped, and that Milliard's purpose in so shipping said property was that he might fraudulently sell the same to the defendant, then their verdict should be for the defendant.

In the case of *Alexander v. Swackhamer*, *supra*, this court, by Mitchell, J., says: "The appellee was not estopped, on the ground of negligence in delivering the cattle, under the circumstances disclosed. To constitute an estoppel, the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposes to set up, and another must have acted on such admission with his knowledge and consent."

If the appellees acted under the belief that Milliard was the agent of the appellant, and that they were selling the property.

to the appellant, basing such belief on the representations made to them by Milliard, we do not think that they would be estopped from claiming their property by reason of permitting the bills of lading to be made out in the name of the supposed agent. The instructions asked by the appellant ignore this phase of the case, and we think the court properly refused to give them. We are of the opinion that the instruction given by the court properly stated the law applicable to the case as made by the evidence.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

SALES. — No title passes to a fraudulent purchaser, and therefore he cannot give title to another by subsequent purchase: *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; compare *Pfeifer v. Sheboygan etc. R. R. Co.*, 18 Wis. 155; 86 Am. Dec. 751.

REPLEVIN, MEASURE OF DAMAGES IN. — In replevin of property having a usable value, the value of its use during the time of detention is a proper item of damages: *Allen v. Fox*, 51 N. Y. 562; 10 Am. Rep. 641; *Yandle v. Kingsbury*, 17 Kan. 195; 22 Am. Rep. 282; *Aber v. Bratton*, 60 Mich. 357; *Coffin v. Taylor*, 16 Or. 375. The measure of damages is the same in replevin as in trover: *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 462. Measure of damages in replevin for logs cut from adjoining tract through a *bona fide* mistake as to the boundary line, and transported to a boom, is the value of the logs at the boom, less the cost of cutting, hauling, and driving them there: *Herdic v. Young*, 55 Pa. St. 176; 93 Am. Dec. 739. The measure of damages for replevin of property is the value of the property at the time of the unlawful taking, with interest thereon to the date of the verdict: *Just v. Porter*, 64 Mich. 565; *Hausleman v. Kegel*, 60 Id. 541.

ESTOPPEL. — A party is not estopped to show that his adversary has taken advantage of him through fraud: *Woods v. Kirk*, 28 N. H. 324; 61 Am. Dec. 614; and so a transaction which is void by law cannot be purged of its infirmity by means of an estoppel: *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. GOODYKOONTZ.

[119 INDIANA, 111.]

FOR WRONGFUL DEATH OF HIS INFANT WARD, guardian has no right of action, except to reimburse the ward's estate for expenditures made for care and medical attendance, or for funeral expenses; the right of action for general damages for loss of service during minority is in the father or mother.

ACTION to recover damages for negligence causing death. The opinion states the facts.

G. W. Easley, T. L. Sullivan, A. Q. Jones, G. W. Friedley, and G. R. Eldridge, for the appellant.

L. Ritter and E. F. Ritter, for the appellee.

MITCHELL, J. Goodykoontz, as guardian, complains of the appellant railroad company, and charges that the death of his ward, George Lowery, a minor under the age of twenty-one years, was instantaneously caused by the negligence and wrongful conduct of the company. The only averment upon the subject of damages is, that the ward left surviving him "a mother and sister and next of kin competent to share in the distribution of the personal estate of said deceased, to whom damages inure," and that by reason of the injury and death the ward's estate has been damaged in the sum of ten thousand dollars.

There was a special verdict, and a judgment for two thousand five hundred dollars.

It is conceded that the action was brought under section 266, Revised Statutes of 1881, which reads as follows: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

It was a settled rule of the common law that no one could maintain a civil action for damages on account of the death of a human being. All claims for injuries to the person were extinguished by the death of the person injured. *Actio personalis moritur cum persona*. If a child was wrongfully injured, the father, or person lawfully entitled to the child's services, might recover for the loss of services during the period of disability up to the time of death, if death resulted. Incidental damages for nursing, surgical and medical attendance, including appropriate funeral expenses in case of death, were also recoverable by a parent.

The statute above set out has added to the common-law remedy of a parent the right to recover all the probable pecuniary loss resulting from the death of a child. The right of action is primarily in the father, but contingently in the mother; and whether there be a guardian or not, the father, or under certain contingencies the mother, may maintain an action under the above section. In estimating the damages,

the value of the child's services from the date of the injury until he would have attained his majority, including the cost of nursing, medical and surgical attendance, occasioned by the injury, together with necessary funeral expenses if death resulted, are to be considered: *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Mayhew v. Burns*, 103 Id. 328; *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 164; 36 Am. Rep. 459; *McGovern v. New York etc. R. R. Co.*, 67 N. Y. 417; 2 Thompson on Negligence, 1292; 2 Wait's Actions and Defenses, 477; Shearman and Redfield on Negligence, 3d ed., sec. 608.

The foregoing are the elements which enter into and presumably comprise the sum of the pecuniary loss sustained by a parent in case of the injury or death of his child; and whether the child was under guardianship or not, the right of action to recover this pecuniary loss is in the parent to whom the child owed service, and from whom he was entitled to receive support. While either the father or mother is alive, unless they have relinquished their right, respectively, to the services of the child, by emancipation or otherwise, and have abdicated their duty to furnish him support, no one else is entitled to maintain an action for the loss of his services during minority, because the injury is to the person entitled to the child's services, and not to the minor's estate: *Walters v. Chicago etc. R. R. Co.*, 86 Iowa, 458; Cooley on Torts, 314 et seq.

If a minor under guardianship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of the ward, precisely as the latter might have recovered through the intervention of a *prochein ami*, in case he had not been under guardianship. This is so, whether the ward's father or mother be living or not. The pain and suffering endured and the permanent injury resulting from the wounding or maiming of a minor are personal to himself, and damages for such pain and injuries are always recoverable for his benefit. We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent's estate. Doubtless, a guardian who has been required to make expenditures for care and medical attendance, or for funeral expenses, out of his ward's personal property, may maintain an action against a wrong-

doer to reimburse the estate; but surely he cannot recover general damages for the death of the ward for the benefit of his estate, no matter who inherit as his heirs. Damages cannot be recovered for the death of a human being, except by or for the benefit of those who are supposed to have sustained a sensible and appreciable pecuniary loss therefrom. Pecuniary loss, not to the estate of the deceased person, but to those who had a reasonable expectation of pecuniary benefit, as of right, or of duty, or from a recognized sense of obligation, from the continuance of the life, is the foundation of the action: *Franklin v. South Eastern R'y Co.*, 3 Hurl. & N. 211; *Dalton v. South Eastern R'y Co.*, 4 Com. B., N. S., 296; *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499; *Mayhew v. Burns*, *supra*; *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15. It is the injury to the survivors entitled to sue, and not the value of the life lost, that forms the basis of damages: *Pennsylvania R. R. Co. v. Zebe*, 83 Id. 318.

Under section 266, only persons having a reasonable expectation of pecuniary benefit, as of right, duty, or obligation, in some sense, from the continuance of the life, are entitled to maintain the action, unless possibly under exceptional circumstances clearly showing appreciable pecuniary loss. Section 284, which gives a right of action to the personal representatives for the exclusive benefit of the widow and children, or next of kin, is entirely disconnected from section 266, and exerts no sort of influence upon the construction of or rights conferred under the latter section: *Mayhew v. Burns*, *supra*. The two are not to be confused or confounded with each other, but each is to be construed independently of the other.

Where the death of a minor has been wrongfully caused, the parent may maintain an action to recover the probable pecuniary loss sustained. The guardian, if there be one, may, no action having been brought by the parent, maintain an action to reimburse the personal estate of the ward for any actual loss: Section 266. If the death of any one is caused in like manner, an action may be maintained by his personal representatives, provided the person whose death has been caused left a wife or children, or next of kin, who had any appreciable pecuniary interest in the continuance of his life: Section 284; *Mayhew v. Burns*, *supra*, and cases cited.

It appears, from the complaint in the present case, that the ward whose death gave rise to the action was a minor, and that his mother was alive at the time the suit was commenced.

Presumably she was, and is yet, unless barred by lapse of time, entitled to maintain an action to recover for the loss of her son's services. Death was instantaneous, and it does not appear that the guardian paid anything out of the ward's personal estate for funeral expenses. Hence the complaint shows no right of action in the guardian.

The judgment is therefore reversed, with costs.

ELEMENTS AND MEASURE OF DAMAGES IN ACTIONS FOR HAVING CAUSED THE DEATH OF HUMAN BEINGS. — The first English statute that gave the right to maintain an action for the recovery of damages for the wrongful killing of a human being was enacted in 1846, and is generally known as "Lord Campbell's Act": 9 & 10 Vict., c. 93. By section 2 of this act, it is provided that "the jury may give such damages as they may think proportioned to the injury, resulting from such death, to the parties respectively for whose benefit such action shall be brought." Statutes of substantially the same import, though varying considerably in their provisions, have been enacted in most, if not all, of the states of the Union. Under the English statute, and under the statutes of nearly all the states in this country, it is a well-established rule, that the jury, in estimating the damages, are confined to the pecuniary loss sustained by the surviving husband, wife, parent, child, or other kindred of the deceased, and cannot take into consideration their mental suffering, nor are they authorized to give damages by way of a *solatium*: Wood's *Mayne on Damages*, 1st Am. ed., sec. 704; Cooley on *Torts*, 271; 2 Thompson on *Negligence*, 1289; 3 Sutherland on *Damages*, 282; *Blake v. Midland R'y Co.*, 18 Q. B. 93; *Pym v. Great N. R'y Co.*, 4 Best & S. 396; *Railroad Co. v. Barron*, 5 Wall. 90; *Brady v. Chicago*, 4 Biss. 448; *Barley v. Chicago etc. R. R. Co.*, 4 Id. 430; *Holmes v. Oregon etc. R'y Co.*, 6 Saw. 262; *Au v. New York etc. R. R. Co.*, 29 Fed. Rep. 72; *Holland v. Brown*, 35 Id. 43; *Little Rock etc. R. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; *City of Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400; *Chicago etc. R. R. Co. v. Shannon*, 38 Id. 338; *Chicago etc. R. R. Co. v. Swett*, 45 Id. 197; 92 Am. Dec. 206; *Illinois etc. R. R. Co. v. Welton*, 52 Ill. 290; *Caldwell v. Brown*, 53 Id. 453; *Chicago v. Scholten*, 75 Id. 468; *Chicago etc. R. R. Co. v. Harwood*, 80 Id. 88; *Chicago etc. R. R. Co. v. Becker*, 84 Id. 483; *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366; 74 Am. Dec. 259; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Rose v. Des Moines etc. R. R. Co.*, 39 Iowa, 246; *Mynning v. Detroit etc. R. R. Co.*, 59 Mich. 257; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 199; *Demarest v. Little*, 47 Id. 28; *Green v. Hudson R. R. Co.*, 32 Barb. 25; *Mitchell v. New York etc. R. R. Co.*, 2 Hun, 535; *Steel v. Kurtz*, 28 Ohio St. 191; *Pennsylvania R. R. Co. v. Zehe*, 33 Pa. St. 318; *Pennsylvania R. R. Co. v. Vandever*, 36 Id. 298; *Pennsylvania R. R. Co. v. Butler*, 57 Id. 335; *Pennsylvania R. R. Co. v. Goodman*, 62 Id. 329; *Pennsylvania R. R. Co. v. Keller*, 67 Id. 300; *Huntington etc. R. R. Co. v. Decker*, 84 Id. 419; *Mansfield etc. Co. v. McEnery*, 91 Id. 185; 36 Am. Rep. 662; *Pennsylvania Tel. Co. v. Varnau*, Sup. Ct. Pa., Oct., 1888; *Nashville etc. R. R. Co. v. Stevens*, 9 Heisk. 12; *City of Galveston v. Barbour*, 62 Tex. 172; *Potter v. Chicago etc. R. R. Co.*, 21 Wis. 372; *Woodward v. Chicago etc. R. R. Co.*, 23 Id. 400. Unless, therefore, there has been pecuniary loss sustained by the plaintiff, no matter how near his relationship to the person killed may be, he can recover nominal damages

only; but where such loss is shown, compensation must be given, no matter how remote the degree of relationship may be: *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *Chicago etc. R. R. Co. v. Swett*, 45 Id. 197; 92 Am. Dec. 206.

The California Code of Civil Procedure, section 377, provides that in an action to recover for the death of a person caused by the wrongful act or neglect of another, "such damages may be given as, under all the circumstances of the case, may be just." Under this statute, it has been held that damages may be given for the mental anguish of the surviving husband, wife, parent, child, or next of kin of the deceased, as well as for loss of society, and that the jury are not limited, in assessing the damages, to the actual pecuniary loss of the plaintiff: *Myers v. San Francisco*, 42 Cal. 215; *Beeson v. Green Mountain G. M. Co.*, 57 Id. 20; *McKeever v. Market Street R. R. Co.*, 59 Id. 294; *Cook v. Clay Street Hill R. R. Co.*, 60 Id. 604; *Nehrbas v. Central Pac. R. R. Co.*, 62 Id. 320; *Cleary v. City R. R. Co.*, 76 Id. 240. And it was held in the case of *Beeson v. Green Mountain G. M. Co.*, *supra*, that it was not error for the court to instruct the jury that, in determining the amount of damages, they had the right to take into consideration the relations proved as existing between the plaintiff and the deceased, her husband, at the time of his death, and the injury, if any, sustained by her in the loss of his society. Myrick, J., who delivered the opinion of the court in that case, said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case' for the jury to take into consideration in estimating what damages would be just, from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." These views were adhered to and followed in the subsequent case of *Cook v. Clay Street Hill R. R. Co.*, *supra*, which was an action brought by the widow of the person killed, and in which the plaintiff was allowed to testify that it was the usual custom of the deceased, during his married life, to be at home after business hours, and that they had lived a happy married life; that for eight years prior to his death she had been an invalid, and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. His daughter, too, was permitted to testify that he was kind as a father; that the social and domestic relations as to the family on his part were happy, and that he was kind and loving to the plaintiff. The admission of this testimony was held not to be erroneous. And in *Cleary v. City R. R. Co.*, *supra*, Belcher, C. C., said: "The mental anguish and suffering of the parents, in addition to the medical attendance and funeral expenses, are elements which, under our peculiar statute, are proper to be considered in determining the amount of the recovery." The Virginia statute provides that "the jury, in any such action, may award such damages as to it may seem fair and just." Under this statute, it has been held that the jury are not confined to mere pecuniary damages, but may award such damages as they may deem to be fair and just, under all the circumstances of the case: *Matthews v. Warner*, 29 Gratt. 570; 26 Am. Rep. 396; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394. The South Carolina statute provides that "the jury may give such damages as they may think proportioned to the injury resulting. Under this statute, it was decided in the case of *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, that it was not necessary for the plaintiffs, the children of the deceased, to prove that they had been pecuniarily damaged, or that they had any legal claim on the deceased for their support. Under the Scotch law,

damages are allowed by way of *solatium*: *Paterson v. Wallace*, 1 Macq. 748; *Pennsylvania R. R. Co. v. Vandever*, 36 Pa. St. 304.

DAMAGES ARE NOT, AS RULE, ALLOWED FOR SUFFERING OF DECEASED resulting from the injury causing his death. The theory of the law is to compensate the survivors for their loss, not to give reparation for the pain and suffering of the deceased: *Holton v. Daly*, 106 Ill. 131; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; *Moran v. Hollings*, 125 Mass. 93; *Kennedy v. Standard Sugar Refining Co.*, 125 Id. 90; 28 Am. Rep. 214; *Cotton Press Co. v. Bradley*, 52 Tex. 587. In the case of *Kennedy v. Standard Sugar Refining Co.*, *supra*, the plaintiff's intestate was killed by a fall, and it was held that damages should not be awarded for his mental suffering during the fall. Morton, J., who delivered the opinion of the court, said: "It may be true, as an abstract proposition of law, that if a man is precipitated from a height by the negligence of another, and is injured, he may recover, as one element of his damages, for any mental suffering he may prove he endured during his fall. But we think that the instruction, applied to the facts of this case, had a tendency to mislead the jury to the prejudice of the defendant. The plaintiff was entitled to recover only such damages as she proved were sustained by her intestate. The burden of proof was upon her to show that the intestate endured mental suffering during the fall, before the jury could allow any damages on that account. But the evidence in the case showed that the intestate became unconscious upon striking the ground. The fall occupied but an instant of time. He could not furnish, and did not furnish, any proof as to his mental condition during the fall. Whether he suffered any mental terror or distress is purely a matter of conjecture. The plaintiff, therefore, could recover nothing on this account." But where the statute provides that the deceased's cause of action shall survive, damages may be recovered for his pain and suffering. And it seems that the personal representative may, under such a statute, recover, not only for the pain and suffering of the deceased, but also for the loss and deprivation of the survivors: *Nashville etc. R. R. Co. v. Prince*, 2 Heisk. 580; *Nashville etc. R. R. Co. v. Smith*, 6 Id. 174; *Collins v. East Tennessee etc. R. R. Co.*, 9 Id. 841; see also *Philo v. Illinois Central etc. R. R. Co.*, 33 Iowa, 47. But in Kentucky the personal representative, having the right to sue for the deceased's pain and suffering, or to sue for the death, must elect between the two causes of action: *Conner v. Paul*, 12 Bush, 144. In *Corliss v. Worcester etc. R. R. Co.*, 63 N. H. 404, it was held that the ordinary grounds of damage are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given for the distress and anxiety of mind in view of approaching death, while in imminent danger from the injury received, and to the close of life.

PUNITIVE DAMAGES ARE NOT RECOVERABLE IN SUCH ACTIONS, unless they are given by the statute: Cooley on Torts, 271; *Holmes v. Oregon etc. R'y Co.*, 6 Saw. 262; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135; *Pennsylvania R. R. Co. v. Vandever*, 36 Pa. St. 298. Some statutes, however, expressly give exemplary damages: *Myers v. San Francisco*, 42 Cal. 215; *Haley v. Mobile etc. R. R. Co.*, 7 Baxt. 239; *Jacobs v. Louisville etc. R. R. Co.*, 10 Bush, 263; *Morgan v. Durfee*, 69 Mo. 469; 33 Am. Rep. 508. And Christian, J., delivering the opinion of the court in *Matthews v. Warner*, 29 Gratt. 570, referring to the Virginia statute, said: "I think it is manifest that the legislature intended . . . to allow the jury in such cases to award punitive and exemplary damages."

When exemplary damages are not allowed to be given, it is not permitted to take into consideration the wealth of the defendant, or the poverty and dependency of the survivors of the deceased, or the number of children left by him, for the purpose of augmenting the damages: *Central R. R. Co. v. Moore*, 61 Ga. 151; *Central R. R. Co. v. Rouse*, 77 Id. 393; 80 Id. 442; *Illinois etc. R. R. Co. v. Baches*, 55 Ill. 379; *Chicago etc. R'y Co. v. Howard*, 6 Ill. App. 569; *Chicago etc. R'y Co. v. Henry*, 7 Id. 322; *Chicago v. McCulloch*, 10 Id. 559; *Benton v. Chicago etc. R'y Co.*, 55 Iowa, 496; *Beems v. Chicago etc. R'y Co.*, 58 Id. 150; *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205; *Staal v. Grand Rapids etc. R. R. Co.*, 57 Id. 239; *Kesler v. Smith*, 66 N. C. 154; *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335; *International etc. R. R. Co. v. Kindred*, 57 Tex. 491. But the pecuniary circumstances of the survivors may sometimes be shown for the purpose of proving the actual extent of their loss, and the reasonable expectation of pecuniary assistance from the deceased: *Barley v. Chicago etc. R. R. Co.*, 4 Biss. 430; *International etc. R. R. Co. v. Kindred*, 57 Tex. 491; *Ewen v. Chicago etc. R. R. Co.*, 38 Wis. 613; *Mulcairns v. City of Janesville*, 67 Id. 24; *Annas v. Milwaukee etc. R. R. Co.*, 67 Id. 46. Thus in the case last cited it was held that the widow of the deceased might show that she had no means of support but what he had furnished her, because that tended directly to show that she suffered pecuniary loss by his death. And where the person killed was the head and support of a family, the jury are entitled to the fullest insight into the circumstances of the family, and may exercise their best judgment in arriving at results *Staal v. Grand Rapids etc. R. R. Co.*, 57 Mich. 239.

THE MEASURE OF DAMAGES UNDER MOST OF THE STATUTES giving a right of recovery for the death of a person is the present value of the reasonable expectation of pecuniary advantage to those entitled to recover which they have lost by his death. It is the amount of pecuniary assistance and support which they might reasonably have expected to receive from the deceased had he lived: *Sykes v. Northeastern R'y Co.*, 44 L. J. Com. P. 191; *Pym v. Great Northern R'y Co.*, 4 Best & S. 396; *Dalton v. Southeastern R'y Co.*, 4 Com. B., N. S., 296; *Franklin v. Southeastern R'y Co.*, 3 Hurl. & N. 211; *Railroad Co. v. Barron*, 5 Wall. 90; *Collins v. Davidson*, 19 Fed. Rep. 83; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Kansas Pac. R'y Co. v. Lundin*, 3 Col. 94; *Denver etc. R'y Co. v. Woodward*, 4 Id. 1; *David v. Southwestern R. R. Co.*, 41 Ga. 223; *Central R. R. Co. v. Rouse*, 77 Id. 393; 80 Id. 442; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *Rafferty v. Buckman*, 46 Iowa, 195; *Kentucky Cent. R. R. Co. v. Gastineau's Adm'r*, 83 Ky. 119; *Louisville etc. R. R. Co. v. Case*, 9 Bush, 728; *McIntyre v. New York etc. R. R. Co.*, 37 N. Y. 287; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Steel v. Kurtz*, 28 Id. 191; *Catawissa etc. R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Mansfield v. McEnery*, 91 Id. 185; 36 Am. Rep. 662; *Pennsylvania Tel. Co. v. Varnau*, Sup. Ct. Pa., Oct., 1888; *Collins v. East Tennessee etc. R. R. Co.*, 9 Heisk. 841; *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840; *Missouri Pac. R'y Co. v. Lee*, 70 Tex. 496; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394; *Potter v. Chicago etc. R. R. Co.*, 21 Wis. 372; *Castello v. Landwehr*, 28 Id. 523; *Lawson v. Chicago etc. R'y Co.*, 64 Id. 447. In Iowa, the damages allowed are such as the estate of the deceased suffered pecuniarily by the death of the deceased: *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Kelley v. Central R. R. Co.*, 5 McOrary, 653.

In determining the measure of damages in this class of cases, much must of necessity be left to the discretion of the jury. And the courts will not

interfere with this discretion unless it has been abused: *Myers v. San Francisco*, 42 Cal. 215; *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *City of Chicago v. Heising*, 83 Id. 204; *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883; *Stoher v. St. Louis etc. R'y Co.*, 91 Mo. 509; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60; *Catawissa R. R. Co. v. Armstrong*, 52 Id. 282; *North P. R. R. Co. v. Kirk*, 90 Id. 15; *International etc. R. R. Co. v. Kindred*, 57 Tex. 491; *Ehnen v. Chicago etc. R'y Co.*, 38 Wis. 613. In the case of *International etc. R. R. Co. v. Kindred*, 57 Tex. 503, Stayton, J., delivering the opinion of the court, said: "The evidence in this class of cases, in the very nature of things, cannot furnish the measure of damages with that certainty and accuracy with which it may be done in other cases." And Hogeboom, J., in delivering the opinion of the court in *Tilley v. Hudson R. R. Co.*, 29 N. Y. 286, said: "I do not understand from the phraseology of the statute that an extremely nice and contracted interpretation should be put upon the term 'pecuniary injuries.' A liberal scope was designedly left for the action of the jury. They are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to amount and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them, from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care, or intellectual culture, or moral training, which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries."

The jury are not limited to the loss actually sustained at the precise period of the death, but may also include prospective losses, provided they are such as they believe, from the evidence, will actually result to the survivors as the proximate damages arising from the wrongful death: *Bolinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; 1 Am. St. Rep. 680; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Houghkirk v. President etc. of D. & H. C. Co.*, 92 Id. 219: Strict proof of the value of the services of a relative in money is not required: *McIntyre v. New York etc. R. R. Co.*, 37 Id. 287; *Ihl v. Forty-second Street R. R. Co.*, 47 Id. 317; *Pennsylvania R. R. Co. v. Goodman*, 62 Pa. St. 329; *Pennsylvania R. R. Co. v. Keller*, 67 Id. 300. But the jury must not guess at the damages. They must use a reasonable discretion in estimating them. And damages out of reasonable proportion to the expectations of pecuniary profit to be justly anticipated from him cannot be awarded: *Ross v. Des Moines etc. R. R. Co.*, 39 Iowa, 246; *Atchison etc. R. R. Co. v. Brown*, 26 Kan. 443; *Chicago etc. R. R. Co. v. Bayfield*, 37 Mich. 205; *Bierbauer v. New York etc. R. R. Co.*, 15 Hun. 559; *Potter v. Chicago etc. R'y Co.*, 22 Wis. 615; *Hutton v. Windsor*, 32 U. C. Q. B. 487.

The jury may, in estimating the value of the life of the deceased to the survivors, take into account his age, health, habits of life, capacity for making a living for himself and family, his condition in life, the probable duration of his life, the wages he was actually earning, and his disposition to be industrious and frugal, or otherwise: *Kelley v. Central R. R. Co.*, 5 McCrary, 653; *Holmes v. Oregon etc. R'y Co.*, 6 Saw. 262; *Hogue v. Chicago & A. R. R. Co.*, 32 Fed. Rep. 365; *Taylor v. Western etc. R. R. Co.*, 45 Cal. 323; *Macon etc. R. R. Co. v. Johnson*, 38 Ga. 409; *Central R. R. Co. v. Rouse*, 77 Ga. 393; 80 Id. 442;

Chicago v. Scholten, 75 Ill. 468; *Chicago etc. R. R. Co. v. Moranda*, 93 Id. 302; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *State v. Cecil County Commissioners*, 54 Md. 426; *Shaber v. St. Paul etc. R. R. Co.*, 28 Minn. 103; *Scheffer v. Minneapolis etc. R'y Co.*, 32 Id. 518; *Clapp v. Minneapolis etc. R'y Co.*, 36 Id. 6; 1 Am. St. Rep. 629; *Grogan v. Broadway Foundry Co.*, 87 Mo. 321; *Roose v. Perkins*, 9 Neb. 304; *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *McIntyre v. New York Central R. R. Co.*, 37 Id. 287; *Santer v. New York Central R. R. Co.*, 66 Id. 50; 23 Am. Rep. 18; *Kesler v. Smith*, 66 N. O. 154; *Burton v. Wilmington etc. R. R. Co.*, 82 Id. 504; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Mansfield etc. Co. v. McEnery*, 91 Id. 185; 36 Am. Rep. 662; *Nashville etc. R. R. Co. v. Prince*, 2 Heisk. 580; *Missouri Pac. R'y Co. v. Lee*, 70 Tex. 496; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; *Lawson v. Chicago etc. R'y Co.*, 64 Wis. 447. Standard life-tables are admissible in evidence for the purpose of determining the probable duration of life: *Armsworth v. South Eastern R'y Co.*, 11 Jur. 758; *Rowley v. London etc. R'y Co.*, L. R. 8 Ex. 221; *Kansas Pac. R. R. Co. v. Lundin*, 3 Col. 94; *Denver etc. R'y Co. v. Woodward*, 4 Id. 1; *Bowman v. Woods*, 1 G. Greene, 441; *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Scheffer v. Minneapolis etc. R'y Co.*, 32 Minn. 518; *Roose v. Perkins*, 9 Neb. 304; *Sauter v. New York etc. R. R. Co.*, 66 N. Y. 50; 23 Am. Rep. 18; *Davis v. Standish*, 26 Hun, 608; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394. But the testimony of competent witnesses is also admissible for that purpose: *Rowley v. London etc. R'y Co.*, L. R. 8 Ex. 221; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315. And the probable duration of life may be proved without the introduction of life-tables: *Beems v. Chicago etc. R'y Co.*, 67 Iowa, 435.

The measure of damages is the pecuniary loss, measured by the probable earnings of the deceased, without considering the opportunities of acquiring wealth by a change of circumstances in his life: *Mansfield etc. Co. v. McEnery*, 91 Pa. St. 185; 36 Am. Rep. 662. And evidence that the deceased was in the line of promotion at the time of his death is not admissible for the purpose of increasing the measure of damages: *Brown v. Chicago etc. R'y Co.*, 64 Iowa, 652. But in *International etc. R'y Co. v. Ormond*, 64 Tex. 485, it was held that no standard by which to estimate the damages for negligently killing a man can be fixed by reference to what he was earning when he died, because the additional experience and skill which he might acquire in some of the years of life of which he was deprived would increase his wages and create an element of uncertainty in fixing any arithmetical standard. Under a statute limiting damages to the pecuniary injury resulting from the death of the person killed, an injury received by some of the next of kin by the dissolution of a partnership between them and the deceased is not within the scope of the statute. And an injury claimed to arise from losing the counsel and advice of a father must be limited to such as would be of pecuniary value: *Demarest v. Little*, 47 N. J. L. 28.

AMOUNT COLLECTED ON LIFE INSURANCE OF DECEASED. — Lord Campbell, the author of the English act, held that the amount of a policy of insurance on the life of the person killed, collected by the party for whose benefit the suit is brought, should be deducted from the amount of the pecuniary loss: *Hicks v. Newport etc. R'y Co.*, 4 Best & S. 401, note. But in this country it is well settled that the damages cannot be reduced in this way: *Pittsburgh etc. R'y Co. v. Thompson*, 56 Ill. 138; *Sherlock v. Alling*, 44 Ind. 184; *Althorff v. Wolfe*, 22 N. Y. 355; *Kellogg v. New York etc. R. R. Co.*, 79 Id. 72; *North P. R. R. Co. v. Kirk*, 90 Pa. St. 15; *Harding v. Town*, 43 Vt. 536. Funeral

expenses, and expenses for medical attendance and nursing, incurred by reason of the injury resulting in death, may be recovered as damages, where it appears that the plaintiff has paid them, or has become liable for their payment: *Little Rock etc. R. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 164; *Murphy v. New York etc. R. R. Co.*, 88 N. Y. 445; *Pennsylvania etc. R. R. Co. v. Bantom*, 54 Pa. St. 495; *Cleveland etc. R. R. Co. v. Rowan*, 66 Id. 393; *Petrie v. Columbia etc. R. R. Co.*, Sup. Ct. S. C., Oct., 1888. But in England it seems that funeral expenses are not allowed: *Boulter v. Webster*, 11 L. T., N. S., 598; *Dalton v. Southeastern R'y Co.*, 4 Com. B., N. S., 296. And in *Holland v. Brown*, 35 Fed' Rep. 43, it was held that under the Oregon statute the expenses of the illness attendant on the injury which caused the death of the deceased, or of the burial of the deceased, were not allowable as damages.

LOSS OF PENSION OR ANNUITY depending upon the continuance of the life of the person killed may be recovered as part of the damages: *Rowley v. London etc. R'y Co.*, L. R. 8 Ex. 221; *Ehnen v. Chicago etc. R'y Co.*, 38 Wis. 613.

SUBSEQUENT MARRIAGE OF WIDOW OR WIDOWER does not affect the question of damages for the death of a husband or wife: *Georgia R. R. & B. Co. v. Garr*, 57 Ga. 277; 24 Am. Rep. 492; *Davis v. Guarnieri*, 45 Ohio St. 470; 4 Am. St. Rep. 548. In the latter case it was held that evidence that the second wife of the plaintiff performed like services, and contributed in like manner to the pecuniary benefit of the family, as the deceased wife and mother was not admissible in mitigation of damages.

DAMAGES FOR DEATH OF MINOR. — The proper measure of damages in an action to recover for the death of a minor child is the probable value of the services of the deceased from the time of his death to the time he would have attained his majority, less the expense of his maintenance during the same time: *Little Rock etc. R'y Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; *St. Louis etc. R'y Co. v. Freeman*, 36 Id. 41; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366; 74 Am. Dec. 259; *Benton v. Chicago etc. R'y Co.*, 55 Iowa, 496; *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 164; *City of Galveston v. Barbour*, 62 Tex. 174; *Potter v. Chicago etc. R'y Co.*, 21 Wis. 372. The fact that the minor killed is an infant of tender years will not prevent a recovery of substantial damages. In such cases, proof of special pecuniary damages is not necessary to maintain the action, or to warrant the jury in finding more than nominal damages: *Chicago v. Scholten*, 75 Ill. 468; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Ihl v. Forty-second St. etc. R. R. Co.*, 47 Id. 317; 7 Am. Rep. 450; *Gorham v. New York etc. R. R. Co.*, 23 Hun, 449; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Brunswick v. White*, 70 Tex. 504. In delivering the opinion of the court in *Ihl v. Forty-second St. etc. R. R. Co.*, *supra*, Rapallo, J., said: "The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that without such proof the plaintiff could not recover would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as

matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion." And Walker, J., who delivered the opinion of the court in *Brunswick v. White, supra*, in discussing this question, said: "1. Where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages; 2. Where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services; the mode such faculties are exercised in, as in useful labor, or otherwise; and when, from the age and undeveloped state of the child, any estimate of value of the services until majority would be matter of opinion, in which no particular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, — then, upon such testimony, the sound discretion of the jury can be relied on to determine the value without any witness naming a sum; 3. As the age of the child increases and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss; 4. The circumstances of the parents suing, as in this case, often become necessary as evidence, not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case, the parents kept a dairy; all the family worked. The child, by attending to some duties, relieved the mother, so that she could engage in other necessary labor." And where the child is an adult, but is, notwithstanding that fact, regularly furnishing support to the parent, the latter may recover the actual loss sustained by him: *Dalton v. Southeastern R'y Co.*, 4 Com. B., N. S., 296; *Weems v. Mathieson*, 4 Macq. 215. And in *Birkett v. Knickerbocker Ice Co.*, 41 Hun, 404, it was held not to be error for the trial court to refuse to charge the jury that damages should be restricted to loss of service during minority. Actual pecuniary damages are not necessarily limited to the minority of the deceased: *Houston etc. R'y Co. v. Cowser*, 57 Tex. 293; *Johnson v. Chicago etc. R'y Co.*, 64 Wis. 425. And the fact that his parents have released to a minor his time will not prevent them from recovering for his death: *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185.

DAMAGES TO CHILDREN FOR DEATH OF THEIR PARENTS may include the loss of nurture, instruction, and physical, intellectual, and moral training as well as mere support: *Illinois etc. R. R. Co. v. Weldon*, 52 Ill. 290; *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252; *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431.

PARENT AND CHILD — ACTIONS FOR DEATH OF INFANT CHILD. — For injuries to infant children causing their death, the father is the proper person to bring action; but where there is no father, then the mother is the proper person; and when there is neither father nor mother, then the guardian must sue; and when neither father, mother, nor guardian, then it devolves upon the administrator to bring the action: *Pittsburgh etc. R'y v. Vining's Adm'r*, 27 Ind. 513; 92 Am. Dec. 269. Compare *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483, *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am.

Dec. 256, *Fairmount R'y Co. v. Stutler*, 54 Pa. St. 375, 93 Am. Dec. 714, as to who can sue for injuries to an infant. A father is entitled to recover damages for the negligent killing of his child; and the amount of such damages is a sum which, under the circumstances, is just and reasonable; and in consideration of their verdict with respect thereto, the jury may properly consider the loss of the child's services during minority, the value of the medical attendance and funeral expenses, and the mental anguish of the parents: *Cleary v. City R'y Co.*, 76 Cal. 240.

MOON v. JENNINGS.

[119 INDIANA, 120.]

TENANT IN COMMON WHO PAYS OFF LIEN AGAINST JOINT PROPERTY IS ENTITLED TO CONTRIBUTION from his co-tenants to the extent of their respective interests; and a court of equity, to secure such contribution, will enforce upon the interests of the co-tenants an equitable lien of the same character as that which has been removed.

TENANT IN COMMON IS NOT ENTITLED TO HAVE HIS TITLE QUIETED as against his co-tenant who holds a certificate of purchase issued by the sheriff on a sale of the joint property under a foreclosure of a mechanic's lien thereon, and who is entitled to contribution from said tenant in common in proportion to his interest in the land.

COMPLAINT IN ACTION BY TENANT IN COMMON TO BE RELIEVED FROM JUDGMENT BY DEFAULT quieting his co-tenant's title is sufficient, where it shows that the plaintiff was misled as to the character of the action by the way in which the complaint in that action was drawn, and by the representations of defendant's counsel as to the nature of the relief sought, and by the violation of an agreement to dismiss the action upon compliance with a certain condition, and also shows, as a defense to the action, that the plaintiff has paid liens against the joint property for which he is entitled to contribution.

ALL GROUNDS OF MOTION FOR NEW TRIAL MUST BE INCLUDED IN ONE MOTION; parties filing a motion for a new trial cannot separate the grounds, and file a separate motion for each cause assigned.

APPLICATION to be relieved from a judgment. The opinion states the case.

B. C. Moon, for the appellants.

C. N. Pollard, for the appellees.

OLDS, J. This is an application on behalf of appellees, under section 396, Revised Statutes of 1881, to be relieved from a judgment taken against them by appellants.

The complaint alleges that the defendants, the appellants, did, on the fifth day of January, 1886, file in the office of the clerk of the Howard circuit court a complaint, in two paragraphs, against the appellees, setting out a copy of the complaint and the judgment rendered in said cause. The first

paragraph of the complaint was for the redemption from a sale of certain real estate owned by appellants and appellees as tenants in common, and which had been sold on foreclosure of a mortgage executed by their grantors, and the certificate of sale issued by the sheriff making the sale was held by the appellees. The second paragraph was a paragraph alleging ownership of the undivided one half of the real estate by appellants, and that appellees claimed an interest in the same, and asking for a judgment quieting title; and it is averred that the second paragraph was so inserted within the sheets of paper upon which the complaint was written that the first paragraph could and would be taken by a person of reasonable prudence and care to constitute the whole of said complaint; that the first paragraph was not numbered, and there was nothing to indicate, to the keenest observer, that there was a second paragraph; that the first paragraph was signed by the attorneys, and between the first and second paragraphs there intervened three pages of blank paper, upon which nothing appeared except the clerk's receipt for \$208, brought into court as a tender in connection with said first paragraph, for redemption of appellants' undivided one-half interest in said real estate; that appellees were served with process in said cause on the sixth day of January, 1886, to appear on the sixteenth day of January, 1886; that neither of appellees appeared, and upon default, judgment was rendered against them, in favor of appellants, quieting the title to said real estate in the appellants; that said judgment was rendered upon the said second paragraph of complaint, and had no relation to the averments contained in the first paragraph, and was not based or rendered thereon; that appellee Margaret E. Jennings was sick, and was thereby disabled and prevented from personally looking after or appearing to said cause, and so remained and continued sick until after the rendition of said judgment in said cause; that she is unacquainted with legal proceedings, and of the nature and character of pleadings, and the only knowledge she had as to the nature and character of said action was such as she received from her husband, William L. Jennings; that William L. Jennings made inquiry, in good faith, of one B. C. Moon, the leading attorney for appellants in said cause, as to the character of said action, on the seventh day of January, 1886, and was then and there informed by said Moon that the only intent and purpose of said action was to enforce the right of said

Moon to redeem the one-half interest in said real estate from said sale on the foreclosure of said mortgage, as in said first paragraph of said complaint set forth; that if said redemption money should be accepted by appellees, then said action should be dismissed at the costs of the appellants; that said William L. Jennings went to the clerk's office and procured said complaint, then on file, and carefully read over the same, and finding nothing but the first paragraph of the complaint, and relying upon the statements and promises of B. C. Moon, attorney for the appellants, the plaintiffs in said cause, that said complaint contained nothing but the matters pertaining to said redemption, and that the same would be dismissed if said redemption money was accepted, did then and there accept said redemption money, and gave the case no further attention, and returned home, and informed his co-plaintiff, Margaret E. Jennings, of the matters stated by the said B. C. Moon, and what said complaint did contain, and that the intent and purpose of the action was only to redeem from said mortgage sale; that she believed and relied upon said statements, and had no reason to suppose or believe that said action involved anything but the redemption from said mortgage sale, and appellees gave the case no further attention; that appellees did not know or learn of the true character of said judgment taken in said cause until June 16, 1886; that ever since the twenty-third day of February, 1884, appellees, as husband and wife, have held and owned a one-half interest in said real estate, by warranty deed from Freeman and Freeman; that at the commencement of said action appellees had, and still have, a complete and meritorious defense to said second paragraph of said complaint, in this, to wit: That on the thirteenth day of January, 1884, at the suit of Hunt and Hunt against one George W. Price and others, in the Howard circuit court, a valid judgment and decree of foreclosure of a mechanic's lien upon all of said real estate was rendered for the sum of \$206.39, with all costs of suit; that on the eighteenth day of November, 1884, a duly certified copy of said decree was issued and placed in the hands of the sheriff of said county, and said sheriff duly advertised and sold said real estate on the tenth day of January, 1885, to said Hunt and Hunt, for \$253.97, and said sheriff issued to said Hunt and Hunt a certificate of purchase therefor, they having paid the price so bid for the same; that long before the commencement of said suit, these appellees, for a valuable consideration, became and were

the legal owners of said certificate of purchase so issued by said sheriff to Hunt and Hunt, and have ever since owned, and still own, the same; that neither said real estate, nor any part of the same, has been redeemed from said sale, and these appellees are the complete equitable owners of all of said real estate; also, alleging another foreclosure of a mechanic's lien on all of said real estate and a sale for \$133.46, and that a sheriff's certificate duly issued to the purchaser, and that the appellees became and were the legal owners of such certificate of purchase before the commencement of said action, and still are the owners of the same; and they ask to have said default and judgment set aside, and that they be permitted to make their defense.

A demurrer was filed to the complaint, and overruled, and exceptions reserved by appellants.

It is contended by counsel for appellants that the complaint does not show that appellees had any defense to the original action to quiet title; that appellants and appellees are tenants in common, and the property of each liable for the debt secured by the mechanic's lien, and that the payment by appellees extinguished the lien, and it could not be enforced by appellees against the interest of their co-tenants, the appellants, in the real estate. Numerous authorities are cited by counsel, which, it is contended, support this theory. We cannot agree to this theory. It is true, it has been so held in some cases of co-tenancy, where the tenancy was created by the same instrument or act, on the theory that such tenants occupied a confidential relation toward each other, and that the payment of the lien operated as an extinguishment, and inured to the benefit of all the tenants; but the true rule, as upheld by the weight of authority, is, that where one tenant in common pays off a lien against the joint property, he is entitled to contribution from his co-tenants to the extent of their respective interests, and a court of equity, to secure such contribution, will enforce upon the interests of the co-tenants an equitable lien of the same character as that which has been removed; and especially is this true where the tenants in common derive their respective titles from a different source: *Titworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Fischer v. Eslaman*, 68 Ill. 78. 4 Kent's Com., 12th ed., p. 371, note c, cited by counsel, which holds that a co-surety having a counter-security is bound to apply it to the benefit of his co-surety equally with himself, is not in conflict with the doctrine we have

announced, but in support of the general principle of equity that they must deal justly with each other; that each co-tenant must share the benefits received, and contribute to the outlay in the protection of the title. In the case of *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552, it is held that the rule that one of two tenants in common who acquires a superior outstanding title must hold it in trust for the other upon that other paying his proportion of the purchase-money only applies when the interest accrues under the same instrument or act of the parties or the law, or when they have entered into some engagement or understanding with one another: *Rippetoe v. Dwyer*, 49 Tex. 498. To the same effect is the case of *Elston v. Piggott*, 94 Ind. 14. Counsel also cites the case of *Klippel v. Shields*, 90 Id. 81, holding that when one co-surety pays a judgment it extinguishes the judgment. We think this doctrine not in conflict with our theory of this case. It is no doubt the law that when one primarily liable for the payment of a judgment makes an unconditional payment of the same, in law it extinguishes and satisfies the judgment; but a different rule applies when one co-tenant pays off a lien against the joint estate or purchases an outstanding title to the estate: *Lowrey v. Byers*, 80 Id. 443; *Eads v. Retherford*, 114 Id. 273; 5 Am. St. Rep. 611. In this case it appears from the original complaint to redeem from the mortgage, which is incorporated in the complaint in this case, and it is admitted by counsel, that the appellees and appellants do not derive their title by the same instrument. It appears from the complaint that the land was sold on a valid judgment against the real estate, and that the appellees purchased and became the owners of the certificate of purchase, which entitled them to contribution from the appellants in proportion to their interest in the land, and the appellees had the right to enforce such contribution by having a lien declared against the interest of appellants in the land, and the appellants were not entitled to a judgment against the appellees quieting their title to said interest in said land while said claim remained unsatisfied. The complaint also shows an agreement between appellees and the attorney of the appellants that the case should be dismissed on the appellees accepting the amount due them by reason of having paid the mortgage lien, and they did accept said amount and rely upon such agreement, and did not appear to the action; and that the complaint in such case was in such form as that it would tend to mislead, and did mislead,

the appellants as to the nature of the action. The complaint was sufficient.

It is also contended that the appellees were not entitled to the relief asked until they had tendered back the money received. The money received had no connection with the relief asked. It was paid in satisfaction of another debt, viz., the amount paid by appellees for the appellants in satisfaction of appellants' share of a mortgage debt against their joint property.

It is contended that the judgment should be reversed, for the reason that there is a variance between the averments of the complaint and the findings of the court. We do not think there is any material variance, such as to authorize the reversal of the judgment, and the finding is fairly supported by the evidence. Nor was there any error in proving what Mr. Bell, one of appellants' attorneys, said to appellee William L. Jennings on the subject of the dismissal of the case if he accepted the money in redemption of the land. It was proper for the purpose of determining whether the Jenningses acted in good faith and had reason to believe the case was to be dismissed.

We do not consider the question as to the use of the complaint in evidence. Parties filing a motion for a new trial for errors occurring on the trial must include all the grounds in one motion; they cannot separate them, and file a separate motion for each cause assigned, and we do not consider the error assigned on the overruling of the second motion for a new trial. There might be a case where a second motion for a new trial would be proper, but this is not such a one.

There is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

OLDS, J. Counsel for appellants contends that there should be a rehearing granted in this case, for the reason that there was a misapprehension and misstatement of the counsel's position in the original opinion; and he contends that the complaint affirmatively shows that appellees and appellants derived title to the real estate in question from the same grantor, who first sold and conveyed to the appellees the one half of the real estate, and afterwards sold and conveyed to appellants the remaining one half; that appellants have the

right to have the appellees' share of said real estate applied to the payment of the liens upon the same, and that the said appellees' interest in said real estate was primarily liable for the payment of the liens which were paid off by appellees, and that therefore they cannot recover, and their complaint does not state facts sufficient to constitute a defense to the complaint of appellants to quiet their title.

Counsel is in error, both as to the misapprehension by the court of his position and as to the averments of the complaint in this action. The complaint avers ownership in the appellees of the undivided one half of the real estate; that valid judgment liens had been recovered against all of said real estate; that the same had been sold thereon, and that certificates of purchase for all of said real estate had been issued, and appellees had purchased the same, and were the holders and owners of said certificates, and the equitable owners of all of said real estate before the commencement of appellants' action to quiet title to said real estate. In the complaint they set out a copy of the complaint of appellants in the action to quiet title, and the judgment rendered in said cause, which they ask to have set aside. In their complaint it is alleged that one George W. Price was the owner of said lot, and upon the —— day of —— he conveyed one half to appellants, and after said conveyance, on the —— day of ——, he conveyed the other one half to appellees, and that the grantees in said deeds respectively agreed that each should pay one half of a certain mortgage then on said real estate. The allegations show that, in effect, said two conveyances were all one transaction; but the complaint in this action does not aver or admit the truth of the averments of the complaint in the action brought by appellants; nor does the finding of facts show that Price owned the real estate, and sold and conveyed to appellants and appellees each one half, and that the sale and conveyance to appellees antedated the sale and conveyance to appellants.

It is further complained by counsel that we did not set out in full the finding of facts which exonerated counsel from any wrong or unprofessional conduct on his part. This we did not, and do not now, deem necessary. The finding of facts fully exonerated counsel from any wrong or unprofessional conduct; but we do not deem the motives which actuated counsel to be material in determining whether the default and judgment should be set aside, as asked in this case. The findings show

a misunderstanding, and that appellees were misled, by reason of which they did not appear, and suffered default.

Petition for a rehearing overruled.

CO-TENANCY — CONTRIBUTION. — Where one co-tenant has paid the taxes assessed in one sum against the property belonging to all the co-tenants, in order to prevent a forfeiture of his interest, and before the land was sold for the tax, the lien is thereby discharged, and equity will not create a new lien in favor of such co-tenant for reimbursement upon the interests of the other co-tenants: *Preston v. Wright*, 81 Me. 306; 10 Am. St. Rep. 257, and note 260, as to the right of one co-tenant to contribution from his co-tenants, where he has paid taxes assessed against them all upon common property. One tenant in common may compel contribution from his co-tenants for their share of taxes rightfully paid by him upon an entire tract of land which descended to all as heirs: *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611, and note; compare *Saunders v. McLean*, 65 Miss. 397. Where a tenant makes improvements which add to the value of the common property, he should be credited with the increased value when charged with rents and profits: *Sutton v. Sutton*, 26 S. C. 33.

CO TENANCY — ADVERSE TITLE. — Where one tenant in common buys the interest of his co-tenants at a judicial sale, and receives a deed therefor, the doctrine of one tenant being presumed to hold for the benefit of all, when he purchases an outstanding title to the common estate, does not apply: *Peck v. Lockridge*, 97 Mo. 549.

CORCORAN v. CORCORAN.

[119 INDIANA, 188.]

CONVEYANCE OF PROPERTY FROM HUSBAND TO WIFE IS PRESUMABLY VOLUNTARY SETTLEMENT, or provision for her benefit, and will, if reasonable, be upheld against the husband and his heirs, unless obtained by fraud or undue influence.

CONTRACT BY WIFE TO SUPPORT HUSBAND, VOID WHEN. — A contract by which a wife, in consideration of a conveyance to her of real estate by her husband, agrees to support him during his natural life, is void, and the husband cannot maintain an action to recover damages for the breach thereof.

ACTION to recover damages for a breach of contract. The opinion states the case.

C. S. Jelley, D. H. Stapp, G. M. Roberts, and C. W. Stapp for the appellant.

L. T. Michener and J. H. Gillett, for the appellee.

MITCHELL, J. This was an action by Martin Corcoran against his wife, Mary Corcoran, to recover damages for the alleged breach of an executory contract. The following are the material facts, as they appear in the complaint:—

In January, 1871, the plaintiff was the owner of a house and lot in the city of Aurora, Indiana, which was of the alleged value of two thousand five hundred dollars, and of the rental value of two hundred dollars per annum. He avers that his wife proposed to him that if he would convey the above-mentioned property to her, she would support and maintain him during his natural life; and that, in consideration of the promise and agreement above mentioned, he executed a warranty deed conveying the property to her in fee-simple. After receiving the conveyance, the defendant treated the plaintiff with great cruelty, compelled him to sleep on the floor, and otherwise mistreated him, so that he was constrained to seek shelter elsewhere. He avers in his complaint that since some time in the year 1879, the defendant has refused "to maintain, support, or keep plaintiff, or to furnish any part or portion of his support, and still refuses so to do, so that plaintiff has been compelled to, and does, maintain and support himself, though in poor health." He charges that his maintenance and support are reasonably worth four dollars a week; that he has sustained damage in the sum of fifteen hundred dollars on account of the default of his wife in the respects mentioned above, which sum he prays may be decreed to be a lien upon the land. The court rendered a personal judgment against the defendant, and entered a decree according to the above prayer. The complaint does not state facts sufficient to constitute a cause of action.

A conveyance of property from a husband to his wife is presumably a voluntary settlement, or provision for her benefit, and if it is reasonable, it will be upheld against the husband and his heirs, unless obtained by fraud or undue influence: 1 Bishop on Married Women, sec. 754; Harris on Contracts of Married Women, sec. 441.

While the conveyance above mentioned was, therefore, presumably valid and binding, the executory contract of the wife to support her husband was void: *Barnett v. Harshbarger*, 105 Ind. 410. The law makes it the duty of the husband not only to support himself, but his wife and children as well; and we know of no rule of law or of public policy which gives any countenance to an attempt by a husband to abdicate the duty which the law casts upon him, and impose it as an obligation upon his wife through the medium of an ordinary oral contract: *Harrell v. Harrell*, 117 Id. 94; *Artman v. Ferguson*, Sup. Ct. Mich., Nov., 1888.

Under the enlightened policy of modern legislation, married women have been relieved of many common-law disabilities, but we have not yet progressed so far as to enable a married woman to bind herself by contract with her husband to assume his obligation to furnish support for both. Contracts between husband and wife are void in law, and are only upheld, especially against the wife, when they are supported by the clearest and most satisfactory equity. It does not appear that the plaintiff was not abundantly able to support himself, or that the property conveyed to his wife was anything more than a reasonable provision for her. It affirmatively appears in the complaint that after the plaintiff's wife refused to abide by the contract the plaintiff supported himself. The *gravamen* of his complaint is, that he was obliged to earn his own support, notwithstanding the contract of his wife, by which he alleges he became exempt from that onerous burden for the remainder of his natural life. He claims that he ought now to be reimbursed, at the rate of four dollars per week, by way of damages, because his wife refused to do for him that which he was able to for himself.

The wrong complained of grows out of a relation which the plaintiff attempted to create with his wife by contract. The real injury complained of is, that she refused to perform an agreement into which he had entered with her. The law will not permit a husband to enforce a contract indirectly by counting on the wife's refusal to perform it as a tort: *Cooley on Torts*, 106; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53.

True, it appears the plaintiff conveyed the house and lot to his wife. That afforded them a place to live, but one or the other must necessarily supply the means of support. It does not appear that either had any other means of furnishing support, except their ability to work. The plaintiff assumes that because he made the conveyance to his wife all concern about support in the future was at an end on his part, since his wife had undertaken to furnish it by contract. It does not appear that the wife had any means of obtaining support for herself, except by her own labor, and even if it did, we are aware of no principle or precedent which would sustain a judgment for damages in favor of a husband against his wife for the breach of an executory contract, and especially a contract of the anomalous character of the one in question. The case must be regarded precisely as if the husband had conveyed the property to his wife without any contract whatever, except

so far as the contract may have operated as an inducement to the conveyance. The wife had no power to make such a contract, and the plaintiff acquired no equitable right through the void contract which a court of equity can recognize.

The judgment is reversed, with costs.

HUSBAND AND WIFE. — A deed from a husband to his wife vests the equitable title in her, though such deed is void at law: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 318, and extended note on deeds from husband to wife 323-326; *Sims v. Ricketts*, 35 Ind. 181; 9 Am. Rep. 679; *Sayers v. Wall*, 26 Gratt. 354; 21 Am. Rep. 303. A reasonable voluntary deed from husband to wife will be upheld against the husband's heirs: *Majors v. Everton*, 89 Ill. 56; 31 Am. Rep. 65; *Horder v. Horder*, 23 Kan. 391; 33 Am. Rep. 167. The duty of maintenance which a husband owes to his wife is a sufficient consideration for a voluntary deed by him to her: *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631.

PHENIX INSURANCE CO. OF BROOKLYN v. PICKEL.

[119 INDIANA, 154.]

OCCUPANCY OF PROPERTY INSURED, WHAT IS SUFFICIENT ALLEGATION OF, IN COMPLAINT. — A complaint in an action on a policy of insurance covering a barn, farming implements, hay, grain, stock, etc., which alleges that on a certain day the barn and the other property insured and in the barn at the time were destroyed by fire sufficiently shows that the building was occupied at the time of its destruction.

COMPLAINT ON POLICY OF INSURANCE STATES CAUSE OF ACTION, where it alleges that the property insured was the property of the plaintiff at the time of the issuance of the policy; that it was on his premises when it was destroyed by fire; that he was damaged to the value of the property; and that he had performed all the terms of the contract on his part.

BURDEN OF PROOF IN ACTION ON POLICY OF INSURANCE. — In an action on a policy of insurance, it is sufficient for the plaintiff to show fulfillment of the conditions of recovery which are made such by the contract itself, and the burden is then upon the defendant to prove the untruthfulness of the representations, if there be any such, upon which he relies. The plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts.

POLICY OF INSURANCE, WHEN SEVERAL AND DIVISIBLE. — Where property insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy is to be regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is to be regarded as several and divisible. Where, therefore, a policy covers a barn and its contents, and a dwelling-house and its contents, it is several and divisible as regards the barn and the house; and false representations as to the condition of the house will not avoid the policy as to the barn and its contents.

CONDITION AGAINST ENCUMBRANCES IN POLICY OF INSURANCE, HOW CONSTRUED. — Where a policy of insurance contains a provision that "if the property shall hereafter become mortgaged or encumbered, this policy shall be null and void," this provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law.

INSTRUCTION THAT PLAINTIFF IS ENTITLED TO RECOVER, UNLESS DEFENDANT HAS PROVED AFFIRMATIVE DEFENSE by a preponderance of the evidence, is correct, in a case where the defendant has withdrawn his general denial.

TO AVOID POLICY OF INSURANCE ON ACCOUNT OF BREACH OF WARRANTY as to the value of the property insured, there must be a substantial breach.

ACTION on a policy of insurance. The opinion states the case.

J. McCabe and E. F. McCabe, for the appellant.

W. A. Cullop, G. W. Shaw, and C. B. Kessinger, for the appellee.

COFFEY, J. This was an action by the appellant against the appellee, brought in the Knox circuit court, to review a judgment. The court sustained a demurrer to the complaint, and the appellant assigns for error this ruling of the circuit court. A complete transcript of the judgment sought to be reviewed is filed with the complaint, and it is alleged that said judgment is erroneous in the following particulars, viz.: 1. That the court erred in sustaining the demurrer of the then plaintiff to the second paragraph of the answer of the defendant; 2. That the court erred in sustaining the demurrer of the then plaintiff to the third paragraph of the answer of the then defendant; 3. That the court erred in sustaining the demurrer of the then plaintiff to the seventh paragraph of the answer of the then defendant; 4. That said court erred in awarding the open and close of the case to the then plaintiff; 5. Error in overruling the motion for a new trial; 9. Error of the court in overruling the motion in arrest of judgment; 12. Error of the court in not sustaining the demurrer filed to the answers back to the complaint.

It is urged by the appellant, under the ninth and twelfth assignments of error, that the complaint in the original cause was bad.

The action was prosecuted on a policy of insurance issued by the appellant to the appellee, whereby the appellee was insured against loss or damage by fire on the property described

in the policy. There was no demurrer to the complaint, and the question of its sufficiency is sought to be raised in this action for a review of the judgment based thereon.

It is contended by the appellant that, to make the complaint good, the appellee should have averred that the property, during the existence of the policy, never became vacant, and that it was occupied at the time it was destroyed by fire; that the appellee had an insurable interest; that the warranties contained in the application for the policy were true; and that the property had not been used for any purpose prohibited by the policy.

The policy of insurance in this suit covers several separate buildings, a barn, farming implements, hay, grain, stock, etc.; and it is averred in the complaint that on the twenty-ninth day of December, 1885, said barn, and the farming implements, hay, grain, stock, etc., covered by said policy, and in said barn at the time, were destroyed by fire, without the fault of the assured. It thus sufficiently appears by the complaint that said building was occupied at the time of its destruction. It is also averred that the property insured was the appellee's property at the time said policy was issued; that it was on his premises, in said barn, at the time it was destroyed by fire; and that the appellee was damaged to the value thereof. It is also alleged in the complaint that the appellee performed all the terms of said contract of insurance on his part. We are therefore of the opinion that the complaint is sufficient to withstand the attack now made upon it, and that it states a cause of action against the appellant: *Home Ins. Co. v. Duke*, 75 Ind. 535; R. S., 1881, sec. 370; *Mason v. Seitz*, 36 Ind. 516; *Bertelson v. Bower*, 81 Id. 512; *Aetna Ins. Co. v. Kittles*, 81 Id. 96; *Board etc. v. Hammond*, 88 Id. 453; *Lowry v. Megee*, 52 Id. 107.

Where a policy of insurance contains conditions and warranties like those contained in this policy, it is sufficient for the plaintiff to show fulfillment of the conditions of recovery which are made such by the contract itself. The burden is then upon the defendant to set forth and prove the untruthfulness of the representations, if there are any such, upon which he relies. The plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts: *May on Insurance*, secs. 183, 590; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192.

It is next urged that the court erred in sustaining a demurrer to the second, third, and seventh paragraphs of the answer of the appellant to the original complaint.

The second paragraph of the answer avers that the policy of insurance in suit was issued upon a written application of the plaintiff to the defendant therefor, a copy of which application is filed with this answer; that in said application the plaintiff stated that dwelling-house No. 1, embraced in said application and policy, was only twelve years old, which statement he warranted to be true in said application, whereas, in truth and in fact, said dwelling No. 1 was then and there older than that, to wit, fifteen years old, whereby said plaintiff broke said warranty, and said policy became void.

The third paragraph alleges that the policy in suit was issued on the written application of the plaintiff; that in said application the plaintiff stated that dwelling No. 1 was in good condition, whereas, in truth and in fact, said house was in a very bad condition, there being openings in the walls so large that a cat could easily go in and out through such openings at pleasure; that the house was an old, dilapidated log hut, in bad fix generally, and thereby said warranty was and is broken, and said policy void.

The seventh paragraph of the answer averred that after the execution of said policy there was a judgment recovered against the plaintiff by Hebbard for \$266.87 by the consideration of the Knox circuit court, which was duly recorded in the office of the clerk of said Knox circuit court, and the same became a lien upon said land whereon the property insured was situate, which is a breach of the covenant against encumbrances, and which makes the policy void by its own provisions.

The provisions of the policy of insurance material to the inquiry here are as follows:—

“By this policy of insurance, the Phenix Insurance Company, of Brooklyn, New York, in consideration of ——— dollars cash, and the payment at maturity of thirty-one dollars, for which the insured hereinafter named has executed a certain promissory note or obligation of even date herewith, and payable on the first day of December, 1885, does insure Pleasant Pickel, Esq., against loss or damage by fire or lightning to the amount of nineteen hundred dollars, as follows: Three hundred dollars on one-story, board-roof, log-and-frame building, occupied by assured as a dwelling; one hundred dollars on household furniture, etc.; one hundred dollars on one-story,

board-roof, log dwelling, occupied by tenant; three hundred dollars on shingle-roof log-and-frame barn; fifty dollars on hay in barn; four hundred dollars on reapers, mowers, etc.; two hundred dollars on grain in granaries or barn, etc.; two hundred dollars on horses, mules, etc.; fifty dollars on hay in stack, etc.; two hundred dollars on board-roof frame smoke-house, etc."

Now, if this is to be construed as a joint and entire insurance of the different articles above enumerated, then the court erred in sustaining the demurrer to the second and third paragraphs of the answer; but if it is to be regarded as several insurance of said items, then the court did not err; for it will be observed that there is no averment in these answers that there was any breach of warranty as to the barn or other property destroyed by fire. Upon this subject there is much confusion and conflict in the authorities, many of them, of great respectability, holding that such a policy is to be construed and applied as a joint insurance of the whole property named, while many more, of equal weight and respectability, hold that such a policy is to be construed as a several insurance of the different items named. Of the former class will be found: *Ætna Ins. Co. v. Resh*, 44 Mich. 55; 38 Am. Rep. 228; *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211; 41 Am. Rep. 843; *Gottsmann v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; 94 Am. Dec. 55; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Hinman v. Hartford F. Ins. Co.*, 36 Id. 159; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472; and many others which might be cited; while of the latter class are: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184; *Trench Chenango Co. M. Ins. Co.*, 7 Hill, 122; *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Loehner v. Home M. Ins. Co.*, 17 Mo. 247; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115.

In the case of *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689, these conflicting authorities were carefully considered, and it was there held that where the contract of insurance is entire and indivisible, as it was in that case, a breach of one of the conditions in the policy affects the entire insurance. But the question of the effect of the breach of one of the conditions of the policy, where it was several and divisible, was left undecided. We think the true rule to be deduced from the authorities above cited is, that where the property is so

situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy should be regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy should be regarded as several and divisible.

In this case we are unable to see how the risk on the house named in the second and third paragraphs of the answer could affect the risk on the barn or the personal property for the destruction of which the suit was prosecuted. The risks on the different items of property named in this policy are, many of them, separate and distinct. It is true that the risk on the household goods in the house would be affected by whatever would affect the risk on the house; so the risk on the grain in the barn would be affected by whatever would affect the risk on the barn, but we think it impossible to conceive of how the risk on the barn could affect the risk on the house, or *vice versa*.

In our opinion, the policy in suit, so far as it secured the appellee against loss in the destruction of the barn and the property contained therein, and the two houses and the household goods therein, is to be regarded as a several and divisible policy of insurance, and that the court did not err in sustaining the demurrer to the second and third paragraphs of the answer.

It is settled in this state that if a party, in order to procure insurance, warrants that his property is free from encumbrances, when in truth and in fact it is not in that condition, such false warranty will avoid the policy: *Leonard v. American Ins. Co.*, 97 Ind. 299. But in the seventh paragraph of the answer now under consideration it is averred that a judgment was recovered after the policy was executed, which became an encumbrance on the property. The condition in the policy is, that "If the property shall hereafter become mortgaged or encumbered, . . . this policy shall be null and void."

It is evident that the parties did not, by the use of this language, intend to include every encumbrance that might attach to the property. This court judicially knows that a lien for taxes attaches to all property on the first day of April of each year, and that such lien constitutes an encumbrance on the

property, and yet we apprehend it would not be seriously contended that such lien would avoid the policy in suit.

The answer is very indefinite and uncertain. It does not aver that the judgment therein named was in force at the time the loss occurred; whether it was voluntarily incurred, or whether it was set aside by the court, or instantly paid by the assured, or still remains unpaid. If rendered against the assured without his consent, and paid at once, there would not be much justice in the contention that the policy in suit was thereby rendered void.

The defendant is claiming a forfeiture on account of a lien not voluntarily placed upon the property by the assured, but one created by law. When a clause in a contract is susceptible of two constructions, one of which will support and the other defeat the principal obligation, the former will be preferred. Forfeitures are not favored in law, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted. In the case of *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570, it was held that language similar to that used in this policy had no reference to encumbrances created by judgment. In our opinion, the word "encumbrance," used in this policy in connection with the word "mortgage," has no reference to such liens as may be created by law, but that it has reference to such liens only as the assured should voluntarily place upon it.

The answer, in our opinion, does not constitute a defense to the cause of action stated in the complaint.

It is also claimed that the court erred in instructing the jury that the plaintiff was entitled to recover, unless the defendant had proven at least one of its defenses by a preponderance of the evidence. This instruction was correct. The defendant had withdrawn the general denial, and as the issues in the cause then stood, the plaintiff was entitled to a judgment for some amount, unless the defendant defeated his right by the establishment of at least one of its defenses set up in the affirmative answers. We do not think the instruction is susceptible of the construction which appellant seeks to place upon it.

Other objections are urged to the instructions given by the court; but when construed as a whole, we think they fairly stated the law, as applicable to the case made by the evidence.

If there was any matter in which the appellant deemed them not sufficiently specific, it should have asked to have the defect supplied.

It is also claimed that the evidence in the cause conclusively proved that the barn and other property covered by the policy of insurance were of less value than warranted. Questions of value must, from their nature, when not applied to articles having a fixed market value, be to a great extent matters of mere opinion. When the appellant executed the policy in suit it must have known this fact, and must be held to have contracted with reference to it. It is true that there might be such a disparity between the actual value of the property and that given by the party seeking insurance as to indicate an intention to mislead, but this is not such a case. The value of the barn in controversy is greatly in excess of the amount for which it was insured. It is settled in this state that to avoid a policy of insurance on account of the breach of a warranty, there must be a substantial breach; *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

This is an open policy, and the appellee could, in no event, recover more than the actual value of the property at the time of its destruction.

We find no error in the judgment sought to be reviewed for which it should be reversed. It follows that the Knox circuit court did not err in sustaining the demurrer to the complaint in this cause.

Judgment affirmed.

Subsequently, another action was brought on the same policy of insurance, for loss sustained from the destruction of the house described in such policy, in which the insurer recovered judgment in the lower court: See *Pickel v. Phenix Ins. Co.*, 119 Ind. 291. The various questions which arose in this second action, and the conclusions of the appellate court therein, were thus stated by that court:—

“The appellee filed an answer in eleven paragraphs, the first being a denial. The second paragraph avers that the policy of insurance was issued upon the written application of the appellant; that in said application the appellant represented and warranted that the house named in the complaint was only twelve years old, when in truth and in fact it was thirty years old, by reason of which breach of warranty said policy is void. The third paragraph of the answer avers that the policy in suit was issued upon the written application of the appellant, and that in said application he represented and warranted that there was only an encumbrance of one thousand dollars on the land upon which the house named in the complaint was located, when in truth and in fact there was a mortgage on said land for the sum of two thousand two hundred dollars, and seven hundred and seventy dollars interest

thereon, by reason of which breach of warranty said policy is void. The fourth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application he represented and warranted that the house named in the complaint was of the then cash value of four hundred dollars, when in truth and in fact it was of the then cash value of two hundred and fifty dollars only, by reason of which breach of warranty said policy is void. The fifth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application he stated and warranted that another dwelling-house situated on the land described in the policy was of the value of three hundred dollars, when in truth and in fact it was of the value of one hundred dollars only, by reason of which breach of warranty the policy was void. The sixth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application the said appellant stated and warranted that the barn described in said policy of insurance was of the value of five hundred dollars, when in truth and in fact it was of the value of three hundred dollars only, by reason of which breach of warranty said policy is void. The seventh paragraph avers that the policy in suit was issued on the written application of the appellant, and that in said application the appellant warranted and stated that the land upon which the house named in the complaint was located was of the value of thirty-five dollars per acre, when in truth and in fact it was of the value of twenty-five dollars only, by reason of which breach of warranty said policy was void. The eighth paragraph avers that one of the conditions of the policy in suit is, that if the buildings therein named shall be or become vacant during the existence of the policy, the same should become void; that in violation of said condition, dwelling-house No. 2, named in said policy, did become vacant after the execution of said policy, and so remained vacant up to the time of the destruction of the house named in the complaint, by reason of which said policy became void. The ninth paragraph avers that certain personal property covered by the policy in suit, consisting of stock and farming implements, was mortgaged in violation of the conditions of said policy, by reason of which said policy became void. It is averred in the tenth paragraph of the answer that, in violation of the conditions of the policy in suit, the appellant mortgaged certain of the personal property insured thereby, consisting of corn and hay, by reason of which said policy became void. It is averred in the eleventh paragraph of the answer that one of the conditions in the policy in suit is, that if the property insured shall become mortgaged or encumbered during the existence of the policy, the same shall become void; that on the eighteenth day of February, 1885, one William J. Hebberd recovered a judgment in the Knox circuit court, which became a lien on the house named in the complaint, by reason of which said policy became void.

“The appellant filed a several demurrer to each of the above affirmative answers, which was sustained as to the eleventh and overruled as to the others, to which he excepted. The appellant then filed a reply in three paragraphs, the first consisting of the general denial. The court sustained a demurrer to the second and third paragraphs of the reply, and the appellant excepted. A trial of the cause resulted in a verdict and judgment for the appellee. The appellant assigns as error: 1. That the court below erred in overruling separately and severally the demurrers to each of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the answer to the complaint; 2. That said court erred in sustaining the demurrers of the appellee to each of the second and third paragraphs of the reply to the

answer; 3. That said court erred in overruling the motion for a new trial. The second, third, and fourth paragraphs of the answer aver breaches of warranty contained in the application for the insurance of the house named in the complaint. These warranties are in relation to the condition of the property destroyed; and where there is a substantial breach of such warranties, the policy is void. The warranties affecting the risk on the house also affected the personal property contained therein. As to the house and its contents, the policy is an entirety, and indivisible: *Phenix Ins. Co. v. Pickel*, 119 Ind. 155. In our opinion, these answers constitute a good defense to the cause of action set up in the complaint. This policy was involved in the case of *Phenix Ins. Co. v. Pickel*, *supra*. In that case it was held that the policy was several as to the different buildings therein named, and that a breach of the warranty as to the one did not affect the other. The fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the answer aver breaches of warranties and covenants having no relation to the building and its contents, for the destruction of which this suit is prosecuted. In our opinion, these several answers constitute no defense to the plaintiff's complaint, and that the circuit court, therefore, erred in overruling the demurrers thereto. The second paragraph of the reply is addressed to the third paragraph of the answer, and avers that the application therein set out was written on a printed blank furnished by the appellee, which had printed questions thereon, with blanks for answers thereto; that said application was made by him at the request of the appellee, through its general agent, S. R. Hopkins, who took the same by reading the questions printed thereon, and writing down the answers of the appellant thereto; that in answer to the question in said application in relation to the real estate on which the buildings insured are situate, 'Is it encumbered in any way? If so, when is mortgage due? and for how much?' the appellant truly answered, 'Yes; there is a mortgage on it for two thousand two hundred dollars, executed to the General Life Insurance Company, of Hartford, Connecticut,' but the said Hopkins falsely and fraudulently, and for the purpose of securing his commission for procuring said contract of insurance, which the appellee promised to pay him, wrote said answer as it appears written in said application, to wit: 'Mortgaged, one thousand dollars'; that thereafter, and as soon as said answers and questions were completed, said Hopkins read the said application over to the appellant, and read the same as if the appellant's proper answer, as above, had been written therein; that the appellant was fifty years of age, and unable to read, and relying upon the promise of said agent to write his answers correctly, and read the same correctly to him when written, which promise said Hopkins made to him, signed the same, after which said Hopkins transmitted it to appellee, who accepted it with full knowledge of the false and fraudulent acts of the said Hopkins, as aforesaid, and with full knowledge thereof, afterwards executed to the appellant the policy sued on, and received from him the premium thereon, to wit, the sum of thirty-five dollars; that the appellee knew at the time it issued the policy in suit that said property was encumbered by the aforesaid mortgage of two thousand two hundred dollars, and did not rely on the statements and warranty contained in said application that the same was encumbered only to the extent of one thousand dollars, but knowing the fact, issued said policy nevertheless. The third paragraph of the reply is addressed to the fourth, fifth, sixth, and seventh paragraphs of the answer, and avers that in estimating the value of the buildings and real estate on which they are situate in his said application, he answered the questions in relation thereto, as set forth in each of said paragraphs of answer, honestly and

truthfully, according to his best judgment of the value of each, without any intention to deceive or defraud the appellee, but with the honest intention of informing the appellee of their true value according to his judgment; that the values thereto affixed by him were their true values at that time according to his best judgment; that appellee accepted said application, and issued to appellant said policy, with the understanding and agreement that the said estimates of value were by the appellant founded upon his best judgment as aforesaid.

“An agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company, and not to the assured: *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. And when the agent thus authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers to questions contained in the application, contrary to the directions of the applicant, who makes true answers to such questions, the company will be estopped by the answers thus written by its agent: *Plumb v. Cattaraugus County M. Ins. Co.*, 18 Id. 392; 72 Am. Dec. 52; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 Id. 152; *New Jersey M. L. Ins. Co. v. Baker*, 94 U. S. 610.

“In this case, it is averred in the reply, and admitted by the demurrer, that the appellant gave the true amount of encumbrance to the appellee's agent; that said agent wrote a false answer to the question contained in the application relating to encumbrances; that applicant could not read; that the agent falsely read the application to him, having agreed to read it correctly; that the appellee had notice of the fraud perpetrated upon the appellant, and, with such knowledge, issued to him the policy in suit, and accepted the premium. We think that the appellee should not, under the circumstances set up in this reply, be permitted to assert now, for the purpose of avoiding the policy in suit, that the answer in said application is not true. In our opinion, the second paragraph of the reply is good, and the court erred in sustaining a demurrer thereto. We think the court also erred in sustaining a demurrer to the third paragraph of the reply. Questions of value, when applied to property of the kind covered by this policy, are, from necessity, matters of mere opinion.

“Wood on Fire Insurance, pages 568, 569, in discussing the question now under consideration, says: ‘How is value determined? Is it not a matter of judgment and opinion wholly, except, it may be, in special instances? How is the value of real estate to be estimated? What is the standard by which to ascertain the value of a building? Is it what this man or that says it is worth? Is it what it would cost to build another of the same style and materials? The ascertainment of any of these facts is a mere matter of judgment. Has not the assured the same right to exercise his judgment, if he exercises it honestly, that his neighbors on the jury have? When the insurers propound this inquiry, upon what basis and by what standard is it to be presumed they expect the insured to estimate the value? Is it reasonable to suppose that they expect him to estimate the value of the materials composing it, the cost of labor to build it, or rather to give his honest judgment and opinion upon the question? Suppose the question in the application to be, “What, in your honest judgment and opinion, is the value of the property?” Would it not be held that, in order to avoid the policy, the insurer must show that the value was not given according to the honest judgment

and opinion of the insured? Most certainly. And it is difficult to conceive how the introduction of the words "judgment or opinion" into the question can affect the right of the parties at all; for in nearly all instances the question of value is well known to be a mere matter of opinion. Particularly is this so as to buildings and real estate generally, and all the insurer expects, or has the right to expect, in answer to a question of the value thereof, is simply the honest judgment and opinion of the assured; and it is absurd to hold the assured responsible for an error of judgment honestly made simply because his neighbors differ with him in that respect. A doctrine that held the insurer up to a strictly exact valuation would be extremely unjust, and would result in vitiating one half the policies issued; for under the rule the difference of one cent is as disastrous as a difference of a large amount.'

"We are of the opinion that there may be a warranty of value, but such warranty amounts to nothing more than that the value stated is the honest judgment and opinion of the party making such valuation. From the very nature of such a warranty, it must be so understood by the insurer when it is accepted. It follows from this, that if the values attached to property covered by the policy in suit are the result of the honest judgment and opinion of the assured, there is no breach of the warranty, and the third paragraph of the reply is therefore good. The loss in this case occurred on the fifteenth day of June, 1886, and the notice of such loss was mailed to the appellee on the fourth day of August thereafter, — a period of fifty days. The policy in suit contains a provision that in case of loss the insured shall forthwith give notice thereof to the company. After proof of mailing the notice to the appellee's agent at Chicago, the appellant, without giving any excuse for the delay in mailing such notice, offered in evidence a copy thereof. Upon objection made by the appellee, the court refused to allow such copy to be read in evidence.

"It is contended by the appellant that under the provisions of section 3770, Revised Statutes of 1881, the condition in said policy is void, and that therefore the court erred in refusing to allow said notice to be read in evidence. Section 3770, Revised Statutes of 1881, prohibits foreign insurance companies doing business in this state from inserting in their policies of insurance a condition requiring the insured to give notice of loss forthwith, or within a period of less than five days. In the case of *Insurance Co. v. Brim*, 111 Ind. 281, it was held that where such a condition was inserted, the same was void, but nevertheless, under a policy containing such a condition, the assured was required to give notice within a reasonable time. Where the facts constituting diligence are in dispute, what is a reasonable time is a question for the jury, under proper instructions of the court, but where the facts are not in dispute, what constitutes a reasonable time is a question of law for the court. In the case of *Railway Passenger Assurance Co. v. Burwell*, 44 Id. 460, it was held, under the circumstances in that case, that six days was not a reasonable time; in the case of *Inman v. Western Fire Ins. Co.*, 12 Wend. 452, thirty-eight days was held to be unreasonable; in *Whitchurst v. North Carolina Mutual Ins. Co.*, 7 Jones, 433, 78 Am. Dec. 246, twenty days was held not to be reasonable, and in the case of *Trask v. State Fire etc. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622, eleven days was held not to be a reasonable time.

"Under these authorities, we are constrained to hold that a delay of fifty days in this case, unexplained, was an unreasonable delay, and that the court did not err in refusing to allow the appellant to read the notice in evidence.

"The judgment of the court below is reversed, with instructions to sustain the demurrer to the fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the answer, and to overrule the demurrer to the second and third paragraphs of the reply, and for further proceedings not inconsistent with this opinion."

INSURANCE — FORFEITURE. — Conditions in an insurance policy invalidating a forfeiture will be construed most favorably in favor of the assured, and most strongly against the insurer: *Mutual Assurance Soc. v. Scottish etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note 826.

INSURANCE — FORFEITURE. — Conditions against encumbrances in an insurance policy refer only to voluntary encumbrances placed upon the property by the assured, not to involuntary encumbrances, as judgments, etc.: *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570; but a mechanic's lien is such an encumbrance as comes within the provisions against encumbrances mentioned in an insurance policy: *Redman v. Phoenix F. Ins. Co.*, 51 Wis. 293; 37 Am. Rep. 830.

BURTON v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

[119 INDIANA, 207.]

PROOF OF FACTS DEHORS POLICY OF LIFE INSURANCE INADMISSIBLE TO CONTROL ITS LEGAL EFFECT. — One who accepts a policy of insurance issued to him upon the life of another will not be permitted to allege and prove a state of facts *dehors* the writing to control its legal effect.

INSURABLE INTEREST MUST BE ALLEGED IN COMPLAINT ON POLICY OF LIFE INSURANCE. — The plaintiff in an action on a life insurance policy issued to him upon the life of another must allege in his complaint that he had an insurable interest in the life of the person insured.

GRANDCHILD HAS NOT INSURABLE INTEREST IN LIFE OF GRANDFATHER. — As a rule, a grandfather is under no legal obligation to support his granddaughter; and in an action by her upon a policy of insurance issued directly to her upon the life of her grandfather, the court cannot infer, as a matter of law, from an averment of the relationship between the parties, such an insurable interest in the life of the grandfather as will uphold the policy.

ACTION on a policy of life insurance. The opinion states the case.

C. L. Wedding, F. M. Finch, and J. A. Finch, for the appellant.

A. Gilchrist and C. A. De Bruler, for the appellee.

BERKSHIRE, J. The complaint is in two paragraphs, to both of which demurrers were filed and sustained, and judgment rendered against appellant for want of a complaint.

The errors assigned bring in review the ruling of the court

below sustaining the demurrers to the paragraphs of the complaint.

The foundation of the action is a policy of insurance issued and made payable to the appellant directly by the appellee upon the life of one Willard Carpenter. The policy recites the payment of the advanced premium by the appellant, and her promise to pay future premiums, as therein stipulated, as the consideration for the execution of the policy. There is an allegation in the paragraphs of complaint that when the policy issued the appellant was but six years of age, and that Willard Carpenter, the insured, was her grandfather, and desiring to make provision for her, he procured from the appellee, for a valuable consideration, the policy sued upon, and that it was his intention that she should occupy the place of a beneficiary, or appointee, and receive the proceeds when payable.

Conceding all that is stated in this allegation to be true (and if material, the demurrer admits its truth), the facts thus stated cannot influence the rights of the parties under the policy. When the appellant accepted the policy and undertook to enforce it, she accepted it as written, and will not be permitted to allege and prove an existing state of facts *dehors* the writing to control its legal effect. This is a proposition so well authenticated that we do not deem it necessary to cite authorities.

There is no allegation in either paragraph of complaint to show that the appellant had an insurable interest in the life of her grandfather. Such an allegation is necessary to a good cause of action: *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; 46 Am. Rep. 185. In that case the relationship was one degree nearer than in the present case, the policy having been issued to the daughter upon the life of her mother.

In *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. 247, the court says: "It must be considered well settled at present that at the common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. It follows that a complaint in an action on the policy must contain an averment of such an interest in order to sustain a cause of action": May on Insurance, sec. 587; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516.

In *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321, the following instruction was asked by the defendant, and refused by the trial court: "That to entitle the plain-

tiff to recover in this action, he must show some insurable interest in the life of John T. Anderson, the insured, and that in the absence of any evidence showing, or tending to show, such insurable interest, the jury must find for defendant." After a discussion of the question presented by this instruction, the court says: "The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed." The foregoing was an action upon a life policy issued to an uncle upon the life of his nephew: See *Guardian etc. Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180. In the latter case the relationship was that of father and son.

As a rule, a grandfather is under no legal obligation to support or provide for his grandchild; and though the relationship may be stated in the complaint, from this fact alone the court cannot, as a matter of law, infer such an insurable interest in the life of the grandfather as will uphold a policy issued upon his life directly to the grandchild.

In *Rombach v. Piedmont etc. Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239, the court says: "The insurable interest in the life of another is a pecuniary interest. A policy of insurance procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy, and therefore void. . . . The books formulate the general principle somewhat in this way: When the insurable interest arises or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. . . . Thus it has been held that a sister had an insurable interest in the life of her brother, where the fact was that she had been supported by him (*Lord v. Dall*, 12 Mass. 115; 7 Am. Dec. 38); and a father in the life of his minor son, because entitled to his earnings (*Mitchell v. Union Life Co.*, 45 Me. 104; 71 Am. Dec. 529); but that he has none from mere relationship to a son (*Halford v. Kymer*, 10 Barn. & C. 724); nor does the mere relation of brother suffice to furnish an insurable interest: *Lewis v. Phenix Ins. Co.*, 39 Conn. 100."

In accordance with this doctrine, it has been decided in Pennsylvania that a son has an insurable interest in the life of his father, because under the poor-laws of that state there is a legal liability resting upon the son for the maintenance of the father, when the latter is unable to work: *Reserve Mut.*

Ins. Co. v. Kane, 81 Pa. St. 154; 22 Am. Rep. 741. See *Keystone etc. Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572.

To the same effect is *Warnock v. Davis*, 104 U. S. 775. Judge Field says: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

In commenting upon the rule as laid down by Judge Field, the annotator, in a very full and able note to the case of *Morrell v. Trenton etc. Ins. Co.*, 10 Cush. 282, and found in 57 Am. Dec. 92, says: "If we correctly understand the doctrine here laid down, it amounts simply to this, that an insurable interest in another's life need not be pecuniary in the sense of being susceptible of definite 'pecuniary estimation,' nor in the sense of being founded upon any mere pecuniary relation, but that it may rest solely upon ties of blood or affinity, and yet that the mere existence of such a tie is not of itself sufficient to constitute an insurable interest, but that the tie must be such as to give reasonable ground for an expectation of benefit or advantage from the continuance of the life. By 'benefit or advantage,' in this connection, we understand that it must be a material or physical 'benefit or advantage.' That is to say, a mere sentimental benefit arising from a gratification of the affections by the prolongation of the life assured will not suffice. The expected benefit must consist in service, maintenance, or the like. This is equivalent to saying that it must be a pecuniary benefit, as distinguished from a mere senti-

mental or moral gratification. Thus understood, the doctrine of these cases, which professedly reject the test of pecuniary interest, is not substantially different from that held in other cases."

If the policy had issued to Willard Carpenter, and recited an agreement on his part to pay the premiums, the appellant being named therein as the beneficiary, or appointee, to receive the proceeds, or had it issued to him, and the proceeds been made payable to him or his assigns, and thereafter assigned to the appellant, we would have for our consideration a very different case than the one before us. In that kind of a case the question of insurable interest could not arise, for every person has an insurable interest in his or her life. *Elkhart Mut. etc. Ass'n v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514, *Provident L. Ins. Co. v. Baum*, 29 Ind. 286, and cases belonging to the same class, are not in conflict with the conclusion we have reached.

Judgment affirmed, with costs.

PAROL TESTIMONY TO CONTROL OR VARY INSTRUMENTS OF WRITING: See *Appeal of Cornell etc. R. R. Co.*, 125 Pa. St. 232; 11 Am. St. Rep. 889, and note; *Sullivan v. Lear*, 23 Fla. 463; 11 Am. St. Rep. 388, and note; *Appeal of Real Estate etc. Co.*, 125 Pa. St. 549; 11 Am. St. Rep. 920, and note.

LIFE INSURANCE—WHO HAS AN INSURABLE INTEREST IN THE LIFE OF ANOTHER: See *Morrell v. Trenton etc. Ins. Co.*, 10 Cush. 282; 57 Am. Dec. 92, and extended note; *Keystone etc. Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572, and note 574, with cases therein collected; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111.

KERN v. BRIDWELL.

[119 INDIANA, 228.]

MISCONDUCT OF COUNSEL IN ARGUMENT IS NOT GROUND FOR REVERSAL, where, upon objection thereto being made, the trial court does all in its power to relieve the party complaining from any injury likely to result from such misconduct.

OBJECTION TO EXCLUSION OF EVIDENCE, HOW RESERVED.—To reserve a question on the ruling of the trial court in excluding the testimony of a witness, a pertinent question must be propounded to him, and upon objection, a statement made to the court as to the testimony which he will give in answer thereto, and an exception must be reserved at the time of the ruling.

EXAMINATION OF PLAINTIFF'S PERSON.—A defendant is not entitled to an order requiring a plaintiff to submit to a physical examination of her person by medical experts, under a plea of justification, in an action by

an unmarried female for slander, wherein it is alleged that the defendant had spoken of the plaintiff that she was a whore, had become pregnant, and had suffered an abortion to be produced upon her.

SLANDER. The opinion states the case.

M. F. Dunn and G. G. Dunn, for the appellant.

G. W. Friedley and J. Giles, for the appellee.

OLDS, J. This is an action for slander, brought by appellee against the appellant. The complaint charges the defendant with having spoken of and concerning Addie M. Bridwell, an unmarried female under twenty-one years of age, that she was a whore; that she had slept with one McCain, and he had had sexual intercourse with her, and she had become pregnant and then procured or suffered an abortion to be procured upon her.

The defendant answered by general denial and a plea of justification, on the ground of the truth of the allegations.

There was a trial, resulting in a verdict and judgment for the plaintiff, the appellee.

The defendant filed a motion for a new trial, which was overruled, and he reserved exceptions to the ruling, and appeals to this court. The only error assigned is the ruling on the motion for a new trial.

The first ground of complaint is the misconduct of counsel for appellee in the opening argument of the case to the jury. Objection was made to the statements of counsel at the time, and the court called the counsel to order, and informed the jury that the statements were improper, and that the jury must disregard them; it also charged the jury to disregard all irrelevant statements of counsel.

The court did all in its power to relieve the party from any injury likely to result from the misconduct of counsel, and there is no action of the court to which an exception can be taken, and there was no error committed by the court: *Grubb v. State*, 117 Ind. 277.

The next question discussed by counsel is the exclusion of certain testimony. The record shows that the defendant produced a Mrs. Kern as a witness, who testified as to the condition and appearance of the plaintiff, Addie M., at the time she was charged by the defendant with having been pregnant, and then asked the witness whether, from the facts stated, the plaintiff was or was not pregnant. Objection was made by

plaintiff and sustained by the court, to which ruling defendant at the time objected.

The record also shows that the defendant produced one John Boyd as a witness, who testified to having seen the plaintiff, Addie M., in December, 1883, and described her condition. Whereupon the defendant offered to prove by the witness that from what he saw of her and from her appearance in December, 1883, the plaintiff was, in his opinion, pregnant at that time. There was no question propounded to Boyd calling for an answer as to the pregnancy of the plaintiff, Addie M., nor did defendant state what he proposed to prove by Mrs. Kern in answer to the question propounded to her. In neither case is there any question presented as to the correctness of the ruling of the court.

The rule has been long and well established that, to reserve any question on the ruling of the trial court in excluding the testimony of a witness, there must be a pertinent question propounded, and upon objection, a statement made to the court as to the testimony which such witness will give in answer thereto, and an exception reserved at the time of the ruling. The rule was in no way complied with in this case, and no question is presented by the record as to the exclusion of the testimony. This rule of practice is so well established, and so reasonable, that there is no cause to deviate from it: *Judy v. Citizen*, 101 Ind. 18; *Higham v. Vanosdol*, 101 Id. 160; *Beard v. Lofton*, 102 Id. 408; *Ralston v. Moore*, 105 Id. 243.

The only other error complained of by counsel is the refusal of the court to order the plaintiff, Addie M., to submit her person to an examination by medical experts. Waiving all questions as to the informality of the application, we do not think there was any error in the ruling of the court in refusing to grant the application and make the order. We are not cited to any case where any court has held such an examination to be proper, and we think none can be found.

One should not publish and circulate slanderous charges against a young unmarried female, as proven in this case, unless he is able to substantiate them, when called upon to do so, without calling upon the court to aid in the search for evidence in his behalf by ordering and subjecting her to an indelicate examination of her person, with the hope of obtaining some information advantageous to the defense, and calling to his aid the power of the court as a means of humiliating her still more. When one voluntarily asserts a slanderous charge

against another, and defends by alleging the truth of his assertion, he must be able to substantiate the truth of the charge without invading the privacy of the person about whom the charge is made. The court very properly refused to make the order requiring the plaintiff to submit her person to an examination. Indeed, the court was exceedingly lenient with the defendant in this case, as the verdict was for eight thousand dollars, and it required the plaintiff to remit the amount in excess of two thousand dollars, and only rendered judgment for the latter amount, which was a liberal exercise of authority in the defendant's behalf.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs and five per cent damages.

MISCONDUCT OF COUNSEL UPON THE TRIAL OF A CAUSE which will amount to error: See note to *Bullard v. Boston and Maine R. R.*, 10 Am. St. Rep. 376, 377; compare extended note to *McDonald v. People*, 9 Id. 559-570, on the misconduct of counsel in their arguments, generally. Extra-professional statements made by counsel in addressing a jury are made harmless, when the matter is set right by the court so that no injury results therefrom: *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458; *Grubb v. State*, 117 Ind. 277.

COMPELLING A PARTY TO A SUIT TO SUBMIT TO A PERSONAL EXAMINATION: See *Sidabum v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and extended note 554-557; *White v. Milwaukee etc. R'y Co.*, 61 Wis. 536; 50 Am. Rep. 154, and extended note 156, 157, with cases therein cited.

WRIGHT v. HUGHES.

[119 INDIANA, 824.]

POWER OF CORPORATION TO BORROW MONEY. — Where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories, and may borrow money to attain its legitimate objects, precisely as an individual, and may bind itself by any form of obligation not forbidden.

ULTRA VIRES, DEFENSE OF, NOT ALLOWED, WHEN. — Where an insurance company having power to borrow money, and to secure its payment by mortgaging its real estate, does so, and uses the money borrowed by it, and afterwards becomes insolvent, neither the corporation nor its policyholders will be heard to contend that the mortgage is void, and that the loan was *ultra vires*, on the ground that the corporation had no power to engage in the transaction in which the money borrowed was used. The doctrine of *ultra vires* only concerns the corporation in its relations with the state and with its stockholders, and is never entertained where it

will injure innocent third persons. It is unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud.

LENDER'S KNOWLEDGE OF USE TO BE MADE OF MONEY DOES NOT INVALIDATE MORTGAGE WHEN. — Although a corporation execute a mortgage to secure the payment of money borrowed by it to be used in a transaction in which it has no power to engage, yet if the contract between it and the lender is not in violation of law, or declared void by statute, the money lent may be recovered by the lender, though he knew the purpose for which the money was obtained, unless he was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act.

ESTOPPEL TO DENY POWER OF CORPORATION TO CONTRACT, WHEN ARISES. — Where a contract has been executed and fully performed on the part of a corporation or of the person with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation.

ACTION to have a mortgage canceled. The opinion states the case.

J. P. Baker, L. Wallace, Jr., and J. P. Dunn, Jr., for the appellants.

A. Baker, E. Daniels, F. Winter, and J. B. Elam, for the appellees.

MITCHELL, J. This was an action by certain of the policyholders of the Franklin Life Insurance Company, the purpose of which was to have canceled and declared void a mortgage executed by the directors of the aboved-named corporation to the Northwestern Mutual Life Insurance Company.

The questions for decision arise on the complaint, which is in two paragraphs, both of which are in legal effect alike. It appears that the Franklin Life Insurance Company was organized in July, 1866, under the general law which provides for the organization of mutual life and accident insurance companies: R. S. 1881, sec. 3763. The company was organized upon the life plan. Its charter provided that the entire management and control of the affairs and business of the corporation should be confided to its board of directors, who were given full power over the affairs of the company. In August, 1881, the board of directors, having discovered that the business of the company had decreased and become unprofitable, and that it was being conducted at a loss, adopted a resolution authorizing the executive officers to buy in all its outstanding paid-up policies, with the view of winding up the business of life insurance, and of changing from life to accident insurance.

It is averred that the change was made without the consent of the plaintiffs, who are and were policy-holders, and without any amendment of the articles of association, or the consent of the state. In January, 1882, the board of directors again resolved to continue the scheme of retiring the company's life policies, and the executive officers were accordingly directed to buy in all outstanding policies of that description on the most advantageous terms. In executing these directions, ninety thousand dollars, all the available assets of the company, was expended in purchasing policies, and it became necessary, in order to complete the purchases, to borrow money. Accordingly, a loan of thirty-seven thousand five hundred dollars was negotiated with the Northwestern Mutual Life Insurance Company. The money was obtained, and used in purchasing policies. As security for the loan, which was evidenced by a bond running five years, with semi-annual interest, a mortgage was executed on the real estate and office buildings of the company, the mortgagee having knowledge of the purpose for which the money was obtained and used. Subsequently, the Franklin Life Insurance Company became insolvent, and made a voluntary assignment. At the time the assignment was made there remained outstanding about three hundred life policies, representing a surrender value of seventy-five thousand dollars, while the assets of the company, after deducting the amount of the debt secured by the mortgage in controversy, aggregated something less than eighteen thousand dollars. It is alleged that the assignee recognized the mortgage in question as a valid obligation, and that he refused to take any steps to set it aside. The plaintiffs, therefore, bring the suit as policy-holders, and ask that the mortgage be declared void, and that it be canceled, and the mortgagee restrained from asserting any claim on account thereof, or on account of the money loaned.

On appellants' behalf it is contended that the facts stated in the complaint show that the money, to secure which the mortgage was given, was borrowed so as to enable the board of directors to buy up for the company its outstanding life policies, in an unauthorized and unequal manner, with a view to effect a change of the company's business from life to accident insurance; that the corporation had neither the power to wind up its life insurance business by the method pursued, nor had it the power under its articles of association to engage in the business of accident insurance; and that hence the loan from

and transaction with the Northwestern Mutual Life Insurance Company were *ultra vires*.

The proposition advanced, that a corporation cannot, without the consent of the share-holders, abandon the fundamental purpose for which it was organized, and engage in transactions or embark its capital in enterprises other than those which come legitimately within the scope of its charter, is abundantly maintained: Green's Brice's *Ultra Vires*, 77. Accordingly it is the established rule that a stockholder, or other person interested, who has not consented, may invoke the aid of a court of chancery to restrain the managing directory from engaging or continuing in an enterprise which involves a material change in the original purposes or powers of the corporation, and which is not in aid of its primary object: *Board etc. v. Lafayette etc. R. R. Co.*, 50 Ind. 85; *McCray v. Junction R. R. Co.*, 9 Id. 358; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; 1 Morawetz on Corporations, secs. 273, 274.

This rule is neither technical nor arbitrary, but has for its foundation the means of affording protection to stockholders who resort to it in good faith for the purpose of holding the corporation to the prosecution of its legitimate and proper business: *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

The appellants, it may be well to remark, are not in a court of equity asking that the corporation in which they are interested as members and policy-holders be restrained from embarking in an enterprise foreign to its original purpose or from winding up the corporate business. These are all matters of the past. The charter of the corporation has been forfeited to the state, and its business is being wound up without objection from the plaintiffs, so far as appears. The only question here is, whether the plaintiffs, who in this proceeding occupy the place of the corporation, may now question the power of its directors, who were intrusted with the management of its affairs, to borrow the money and execute the bond and mortgage which they now seek to have canceled and declared of no effect, after the corporation has received into its treasury and used the money which they were given to secure. The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries with it, by implication,

unless restrained by the charter, the power to secure the loan by mortgage. Accordingly, it may be regarded as settled that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden: *New England etc. Ins. Co. v. Robinson*, 25 Ind. 536; *Jones v. Guaranty etc. Co.*, 101 U. S. 622; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Booth v. Robinson*, 55 Md. 419; *Hays v. Galion Gas Light Co.*, 29 Ohio St. 330; *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388; Green's *Brice's Ultra Vires*, 223; 1 Morawetz on Corporations, secs. 342, 343.

In the absence of any express or implied limitations upon the power of the Franklin Life Insurance Company to borrow money, it might well be held, for anything that appears in the complaint, that the board of directors, in whom was vested broad and comprehensive powers in respect to the management of the business of the corporation, did not exceed its authority in making the loan for the purpose of buying in outstanding policies, if that seemed the best method to avert financial disaster. However this may be, since there was no statute prohibiting the company from purchasing its outstanding policies, or from borrowing money for that purpose, and the transaction was not intrinsically illegal or immoral, the bond and mortgage given to secure the loan of money to be used in taking up the policies were not void. The plaintiffs having come into a court of equity to avoid a transaction which at the most was only voidable, they must, in order to obtain any standing, offer to do equity. It is not equitable to ask a court of conscience to avoid a mortgage given to secure borrowed money without offering to return the money which has been received. Having received the full benefit of the contract, it would now be a glaring injustice to allow those representing the corporation to set it aside and retain the benefit by sustaining their contention that the loan was *ultra vires*; especially as this doctrine only concerns the corporation in its relations with the state and with its stockholders, and is never entertained where it will injure innocent third persons: *Bissell v. Michigan Southern etc. R. R. Co.*, 22 N. Y. 258.

Where a corporation makes a contract that is in excess of its chartered powers, it may well be that while the agreement

remains wholly executory it cannot be enforced. So long as the contract is unexecuted, it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, cannot be enlarged by the mere form of a contract which it had no capacity to make: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 30. The doctrine of *ultra vires* may be appealed to in such a case to resist the enforcement of a contract. It would be carrying that doctrine to an unwarranted extent, however, to hold that a corporation might obtain the money of another, and with the fruits of the contract in its treasury, interpose the defense of *ultra vires*, or having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of *ultra vires* unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act *ultra vires*, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. The most that can be said in the present case is, that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act: *Sondheim v. Gilbert*, 117 Ind. 71; *Cummings v. Henry*, 10 Id. 109; *Bickel v. Sheets*, 24 Id. 1.

Wharton states the rule thus: "It is not enough that the party lending might have foreseen that the money would have been likely to have gone to an illegal object, or that the person borrowing was engaged in illegal enterprises. Nor will it be enough that there was an intention that the party borrowing should illegally appropriate the loan. He must know

that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction": Law of Contracts, secs. 341, 343; *Thompson v. Lambert*, 44 Iowa, 239.

The conclusion which follows is, that even if it were conceded that the money was borrowed to be used in a transaction altogether beyond the power of the corporation, and that the lender knew the purpose for which it was to be used, since there is no statutory prohibition involved, and the lender was in no way in complicity with the borrower in carrying out the transaction in which the money was used, there exists no impediment against the enforcement of the contract.

As there was, at the utmost, merely a defect of power in the corporation to engage in the transaction in which the money was used, and no restriction whatever upon its power to make the loan and execute the securities here in question, neither the corporation nor the plaintiffs, who occupy its place, will be heard to assert that the transaction in which the money was borrowed was *ultra vires*. If, however, it were conceded that the borrowing of the money was a transaction beyond the chartered power of the corporation, the authorities fully justify the conclusion that it would not be heard to assert the invalidity of the transaction while it retained its fruits. The rule is now too thoroughly established to be longer open to question, that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation: *State Board etc. v. Citizens' Street R'y Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Louisville etc. R'y Co. v. Flanagan*, 113 Ind. 488; 3 Am. St. Rep. 674; *Chicago etc. R'y Co. v. Derkes*, 103 Ind. 520; *Pan-coast v. Travelers Ins. Co.*, 79 Id. 172; *Hitchcock v. Galveston*, 96 U. S. 341; *Railway Co. v. McCarthy*, 96 Id. 258; *Bradley v. Ballard*, *supra*; *Memphis etc. R. R. Co. v. Dow*, *supra*; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504.

"Corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so, their exemption from liability cannot be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act": *Bissell v. Michigan Southern etc. R. R. Co.*, *supra*.

The law never sustains the defense of *ultra vires* out of

regard for the corporation. It does so only where the most persuasive considerations of public policy are involved: *Wright v. Pipe Line Co.*, 101 Pa. St. 204; 47 Am. Rep. 701; *Oil Creek etc. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160; *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336.

There are some other points of minor importance discussed in the briefs, but they do not affect the merits of the controversy. The complaint did not state facts sufficient to constitute a cause of action.

The judgment is affirmed, with costs.

CORPORATIONS, POWERS OF—POWER TO BORROW MONEY AND CONTRACT DEBTS: See Lawson's Rights and Remedies, sec. 383, with cases cited in foot-note thereto. Corporations, within the scope of their authority, have all the powers of ordinary individuals: *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150.

CORPORATIONS—CONTRACTS ULTRA VIRES—ESTOPPEL: See note to *New York Fire Ins. Co. v. Bennett*, 13 Am. Dec. 108, 109. The defense of *ultra vires* cannot be set up by a corporation to the injury of an innocent third party: *State Board v. Citizens' Street R'y Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Whitney Arms Co. v. Barlow*, 62 N. Y. 62; 20 Am. Rep. 504; *Hough v. Cook County Land Co.*, 73 Ill. 23; 24 Am. Rep. 230; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656. See also, for the law of *ultra vires* as applicable to a corporation's executed contracts, Lawson's Rights and Remedies, sec. 365, and cases cited.

UNGERICHT v. STATE.

[119 INDIANA, 879.]

WHETHER SHAVING OF CUSTOMER BY BARBER ON SUNDAY IS WORK OF NECESSITY, within the meaning of the exception in the statute prohibiting the desecration of the sabbath, is a question of fact to be determined by the jury, under proper instructions from the court.

PROSECUTION for desecration of the sabbath. The opinion states the case.

J. L. Griffiths and A. F. Potts, for the appellant.

L. T. Michener, attorney-general, and *J. H. Gillett*, for the state.

COFFEY, J. This was a prosecution by the state against the appellant, instituted before the mayor of the city of Indianapolis, for desecration of the sabbath.

The affidavit charges that John Ungericht, late of said city and county, on the eighteenth day of March, 1888, at the city and county aforesaid, was then and there found unlawfully at

common labor, and engaged in his usual occupation and avocation, to wit, that of a barber, and being then and there engaged in shaving one Jacob C. Yunker, at and for the price of fifteen cents, such common labor, work, and avocation not being then and there a work of charity or necessity, and the said John Ungericht being then and there a person over fourteen years of age, and not a person who conscientiously observed the seventh day of the week as the sabbath, nor a traveler, nor a family removing, nor the keeper of a toll-bridge or toll-gate, nor a ferry-man, acting as such, and the said eighteenth day of March, A. D. 1888, being the first day of the week, commonly called Sunday.

The appellant was convicted before the mayor, and upon appeal to the criminal court he was again tried and convicted, and now appeals to this court, and assigns as error that the criminal court erred in overruling his motion for a new trial.

Section 2000, Revised Statutes of 1881, is as follows: "Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor, or engaged in his usual avocation (works of charity and necessity only excepted), shall be fined in any sum not more than ten nor less than one dollar; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the sabbath, travelers, families removing, keepers of toll-bridges and toll-gates, and ferry-men, acting as such."

It is earnestly contended by the appellant that the matter of shaving is a work of necessity, and that therefore it falls within one of the statutory exceptions, and that he is not liable to criminal prosecution for performing such work of necessity on Sunday.

Many legal definitions of the word "necessity" are to be found in the authorities; but the following, from the Chicago Legal News (volume 12, page 44) seems to give the result of all the authorities upon the subject: "The law contemplates that the community has a general need that all should rest on Sunday; most of the affairs and doings of week-day are less important than this need of a rest-day; but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental occupation during others; to nurse and heal the sick; to provide prompt burial of the dead,—these and some other objects are superior to the need of general

repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than its day of rest."

It is perfectly clear, however, that the word "necessity," as used in the statute, is incapable of an accurate and comprehensive definition. Any attempt by the courts to frame a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to the circumstances, and is therefore more a question of fact than of law: *Mueller v. State*, 76 Ind. 310; 40 Am. Rep. 245. In this case it is said: "What does necessity, as used in this law, mean? It may be said, as has been said before, that it does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done under the circumstances of any particular case: *Morris v. State*, 31 Ind. 189. Generally speaking, it ought to be an unforeseen necessity, or if foreseen, such as could not reasonably have been provided against."

It was held more than fifty years ago that the matter of shaving customers was not a work of necessity, and therefore a violation of the law prohibiting the desecration of the sabbath: *Phillips v. Innes*, 4 Clark & F. 234; Bishop on Statutory Crimes, sec. 245.

In the case of *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555, the court says: "The indictment needed not to allege that it was not a work of necessity or charity. The court will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute."

In the cases of *Commonwealth v. Jacobus*, 1 Pa. Leg. Gaz. 491, 15 Cent. L. J. 145, and *Commonwealth v. Williams*, 1 Pears. 61, 15 Cent. L. J. 145, it was held that a barber who shaves persons on Sunday in a public shop is guilty of sabbath-breaking.

In the case of *Commonwealth v. Jacobus*, *supra*, the court says: "But is it a work of necessity? Many persons shave themselves on that day who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonorial parlor" at ten o'clock on Sunday morning; but the court thought that made no difference, and added:

"If the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the legislature, and not with the court."

But it is held by this court that it must be left to the jury, as a question of fact, to determine, under proper instructions from the court, what particular labor, under the circumstances, would constitute a work of necessity: *Edgerton v. State*, 67 Ind. 588; 33 Am. Rep. 110.

In this case the question was submitted to a jury, under proper instructions from the court, as to whether the shaving of Yuncker, under the circumstances, constituted a work of necessity. The jury found against the appellant upon that question. We cannot say that their verdict is not supported by the evidence. The court, therefore, did not err in overruling the motion for a new trial.

Judgment affirmed.

SUNDAY. — COURT TAKES JUDICIAL NOTICE that the labor of a barber on Sunday is not necessary: *State v. Frederick*, 45 Ark. 347; 55 Am. Rep. 555. *Contra*, *Edgerton v. State*, 67 Ind. 588; 33 Am. Rep. 110.

LABOR IN OPERATING ICE-FACTORY MAY BECOME a "work of necessity" within the exception in a statute which otherwise prohibits laboring on Sunday: *Hennerdorf v. State*, 25 Tex. App. 597; 8 Am. St. Rep. 448, and see cases collected in note 449.

BRAZIL BLOCK COAL COMPANY v. GAFFNEY.

[119 INDIANA, 455.]

CHARACTER OF LABOR TO BE REQUIRED OF BOY TEN YEARS OF AGE, without experience, who is employed to perform labor, is implied to be such as is within the compass of his age, capacity, and experience.

MASTER IS LIABLE FOR INJURIES SUSTAINED BY BOY who, without being instructed or cautioned, is ordered to perform a service the hazards of which, on account of his immature age, he is incapable of appreciating, although they are visible, or whose mind or strength is so immature that, though he has been instructed and cautioned, he is incapable of appreciating the instruction and warning or of safely performing the service required of him.

ORDERING CHILD TO PERFORM SERVICE HE DID NOT UNDERTAKE TO PERFORM, EFFECT OF ON LIABILITY OF MASTER. — Where a boy ten years old employed by a coal-mining company to do work within his capacity is, without instruction or caution, ordered by the person in charge of the workmen employed at the mine to leave his regular work and assist in switching and coupling cars, and does so, believing it to be his duty to obey, and while doing so is injured, the master is liable.

OBJECTION TO COMPLAINT, WHEN MUST BE MADE BY MOTION TO MAKE MORE SPECIFIC. — Where a complaint alleges that the plaintiff was

compelled to perform the act which resulted in the injury to him, an objection that the facts constituting the compulsion are not stated cannot be reached by demurrer, but must be made by a motion to make the complaint more specific.

WHAT AMOUNTS TO COMPULSION IN CASE OF BOY TEN YEARS OLD who is ordered by men having authority to direct him to perform a hazardous service is a question for the jury.

ACTION for personal injuries. The opinion states the case.

C. A. Knight and A. W. Knight, for the appellant.

J. A. McNutt and J. Q. Cornell, for the appellee.

BERKSHIRE, J. There are two paragraphs in the complaint, the substance of each of which we will state. The substance of the first paragraph is as follows:—

On the second day of July, 1885, the appellant was the owner and in possession of a certain coal mine, known as "No. 3," and was on that day engaged in mining and removing therefrom large quantities of coal; and to facilitate the removal of the coal mined from said mine, a switch had been built, connecting the said mine with the Vandalia railroad, which, together with certain cars that were on said switch for the purpose of receiving the coal that was being mined, was under the absolute control of the appellant, who on that day was engaged in loading, switching, and coupling said cars, the said loading, switching, and coupling being required in the removal of the coal that was being mined; that the appellant kept in its employ at said mine one Thomas Young, who was its bank-boss, or mine superintendent, and who was, by virtue of his position and the authority conferred upon him, authorized and empowered to hire and discharge workmen at and about said mine, and given the management and control of all the work in and about the same, and to whom was delegated all the duties which the appellant owed to its employees, among which were the duties of keeping the said mine, its rooms and entries, in good and safe repair, to use reasonable diligence in the employment of careful and prudent workmen, to give them instructions concerning the subject of their employment and duties with respect to each other, and to caution young and inexperienced workmen of the risks to which they would be exposed in operating dangerous machinery, handling unsafe implements, or in performing work which would expose such persons to perils of which they had no knowledge. To assist said Young in performing his duties as an overseer

of the workmen and work, one John Mushett was employed by and with the knowledge and consent of the appellant, and with like knowledge and consent was given the position of weighman, or weigh-boss, of said mine, and the immediate control of the workmen and work at and about the top of the same, including the management and control of the cars, and everything pertaining to them.

On the — day of —, 1885, the appellee was hired by the said Young (the contract being made with his mother, his natural and legal guardian) as a workman for the appellant, and was placed under the control of the said Mushett, and was assigned to the work of greasing bank-cars when elevated out of said mine, at a place called "Tipple"; that after the appellee, who was of very tender years, had been at work for the appellant for a number of weeks under the control of the said Mushett, and subject to his orders, the said Mushett directed him to assist one Haines, who was also subject to the orders of Mushett, in switching the cars on said switch, and at the proper time to couple the same; that in giving the said order the said Mushett was acting in the line of his duty, and well knew that the appellee was very immature in years, without experience in, and physically unable to perform, such work, which was very dangerous and specially hazardous, and at the time of the giving of said order to the appellee, or before, no warning was given him of its dangerous or hazardous character; and had the said Mushett, or any one else, cautioned the appellee, owing to his tender years (being but ten years of age), and the immaturity of his mind, he could not have retained the words of caution in his mind with sufficient distinctness to have performed such work with safety to himself; that the said Young wholly failed to give the appellee instructions concerning the scope of his employment or his relation to the other workmen at the time he was placed under the control of the said Mushett, and that such instructions were never given him at any time by any person; and in consequence of the failure of the appellant to do its duty in the respect named, the appellee, while assisting the said Haines in the attempt to couple the said cars, and while exercising that care and caution which might be expected of one so young, and without fault or negligence on his part, his left hand was caught between the cars, and so bruised, crushed, and mangled that amputation became necessary.

The second paragraph differs from the first, in that it alleges

that the appellee was employed to do non-hazardous work, and charges that the work which he was doing was hazardous, and details the circumstances attending the accident, which are in substance as follows: That after the appellee had been in the employ of the appellant for some weeks, engaged in the performance of such work as came within his contract of hire and subject to the control of the said Mushett, he was, with the knowledge and consent of the appellant, directed, ordered, and compelled by one Haines, the leveler of said mine, and one of the employees of the appellant, and who was under the control of the said Mushett, and in the presence of the latter, and with his consent, knowledge, and acquiescence, and while Haines and Mushett were acting within the scope of their employment, to quit his regular work and assist the said Haines and Mushett in coupling cars delivered on said switch for the purpose aforesaid, which work was dangerous and specially hazardous, and attended with great peril for one so young and inexperienced, and was no part of the work he had contracted to perform; that Haines well knew, when he required and compelled the appellee in the manner stated to engage in said work, of the dangerous character of the same, and knew his age and inexperience, and gave him no information, warning, or caution, nor did any one else.

Demurrers were overruled to each of these paragraphs of complaint, and exceptions reserved, after which the appellant answered in one paragraph, which was a general denial.

There was a jury trial, resulting in a verdict for the appellee, and, over a motion for a new trial, followed with the proper exceptions, judgment was rendered for the appellee.

Several errors are assigned, the substance of which is as follows: 1. The court erred in overruling the demurrer to the first paragraph of complaint; 2. The court erred in overruling the demurrer to the second paragraph of complaint; 3. The court erred in overruling the motion in arrest of judgment; 4. The complaint does not state facts sufficient to constitute a cause of action; 5. The court erred in overruling the motion for a new trial.

We need not consider the fourth error, as it is covered by the first and second. In our opinion, both paragraphs of the complaint are good, and the court committed no error in overruling the demurrers.

The first paragraph of the complaint does not allege that the appellee was hired to perform non-hazardous work, or to

perform labor of a particular kind or character; but the age of the appellee is stated to have been but ten years; that because of his tender age his mind was immature, and he was without experience.

Where a boy but ten years of age, and without experience, is employed to perform labor, the character of the labor to be required of him is implied; it is such as is within the compass of a boy's age and experience.

No one will contend, we think, that the master who employs a ten-year-old boy without experience expects of him the same amount or kind of service that he expects when he employs a mature and experienced man. And that the appellant contemplated, when it took the appellee into its service, that he was to perform such labor as would be within his capacity, he was at first given a position down in the mine, but as soon as his extreme youth was made known, he was given employment at the top of the mine, lighter and less dangerous in character.

Counsel for the appellant claim that the first paragraph of the complaint falls within the reasoning of this court in the case of *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282. We do not think so. It is true that the employee in that case was a minor, but he was nineteen years of age, a well-developed and apparently strong man, and to all appearances as well qualified to understand and provide against the hazard or danger that would attend any kind of labor that he might have been called on to perform as if he had been an adult, and in the consideration of the case he is so regarded. We quote from the opinion:—

“In the case at bar, the appellee does not claim in her complaint that her son did not have, notwithstanding his alleged nonage or minority, full knowledge of all the hazards of his employment. On the contrary, it appeared from the complaint that appellee's son was nineteen years of age at the time of his injury and death, and for some time previous had been an employee of the appellant in mining coal. It must be assumed, therefore, in the absence of any showing to the contrary, that he voluntarily engaged in driving the coal-cars through the avenues of the mine with full knowledge of the dangers of the business. In such case, neither the employee nor his mother, the appellee, could legally claim that on account of his infancy the appellant should be held liable for his injury and death, caused, as alleged, by the negligence of his fellow-ser-

vant. Although the appellee's son was a minor under the age of twenty-one years at the time he entered into the appellant's service, and at the time of his injury and death, yet it appeared that he was of sufficient age and experience to understand fully the hazard and dangers of the service, and therefore it must be held that, by engaging in such service, notwithstanding his minority, he took upon himself the natural and ordinary risks incident to the business in which he was engaged, among which was the negligence of his fellow-servants, whether of high or low degree, in the same common enterprise."

The proper distinction, as we think, is taken in the case of *Sullivan v. India Mfg. Co.*, 113 Mass. 396. We take the following from the opinion of the learned judge in that case: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might, with reasonable care, and by reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected. In the present case, the evidence of the plaintiff was that he went to work in the place pointed out by the defendants. He thus consented to the dangers attending the work, all of which was apparent; and if he had sufficient knowledge and capacity to comprehend them, he cannot now complain that such place might at moderate expense have been made safer. . . . It may frequently happen that the dangers of a particular position for, or mode of, doing work are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on

the part of the master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely, without instructions or cautions which he did not receive."

The following is from the opinion delivered by Hoar, J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 3 Am. Rep. 506, which is a leading case: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers": See *O'Connor v. Adams*, 120 Mass. 427.

In the case of *Rock v. Indian Orchard Mills*, 142 Mass. 522, which was a suit brought by a boy thirteen years old to recover for personal injuries, the court decided that it was the duty of the defendant to give suitable instructions to the plaintiff, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they were, of the employment in which he was engaged.

Where the master orders his servant, a child, into a service which he did not undertake to perform, and while in such service, the same being attended with peculiar hazard, the servant is injured while obeying the command, the master is liable: 2 Thompson on Negligence, p. 976, secs. 7, 8.

In *Railroad Co. v. Fort*, 17 Wall. 553, Judge Davis delivered the opinion in the case, and as it is very much in point to the case under consideration, we will quote from it at considerable length: "It is apparent, from the findings in the present suit, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as

broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction. The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract, and wholly disconnected with it. To work as a helper at a molding-machine, or a common work-hand on the floor of the shop, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute. The father had the right to presume, when he made the contract of service, that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might, with some plausibility, be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or at any rate, if he chose to obey, that he took upon himself the risks incident to the service.

But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so. . . . For the consequences of this hasty action, the company is liable, either upon the maxim of *respondent superior*, or upon the obligations arising out of the contract of service."

In the case of *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92, the learned judge delivering the opinion of the court said: "In the case at bar, the plaintiff, a boy of thirteen years of age, with little experience and familiarity with machinery, and hired from his father by the defendant company 'to sweep, carry water, and fill the buckets with quills,' in the weaving department of its cotton-mills, was ordered into the position of danger already described, by one in the employment of the company, and, under the circumstances, on that occasion necessarily representing the company. When the injury occurred to this boy he was not doing the work his father engaged him to do. On the contrary, he was, at the time, employed in a service outside the contract and wholly disconnected therewith. To sweep, carry water, and fill buckets with quills, is quite a different thing from standing on a ladder and holding up a heavy belt, surrounded by the belts of four looms in dangerous proximity to his person, and these belts plying over pulleys making over a 120 revolutions per minute. The one is the work of a boy, and within the compass of a boy's strength and experience; the other requires the strength, experience, and judgment of a man, and is a man's work, to say the least. Thus situated, holding up and aiding to adjust a displaced belt that ran a loom in the upper room, the plaintiff received the injury which makes him a comparatively helpless cripple for life. Neither he nor his father, when the contract of service was made, had any ground to expect that he would be called on to encounter any such peril. Eastwood, the second boss, was intrusted with the care, management, and repair of the machinery, in connection with the repairs of which this shocking accident occurred. He

needed help to mend a broken belt and readjust displaced machinery. There was no one present in the room when the adjustment was to be effected except this boy, the plaintiff in error. Eastwood, by the usage of this company's employees, was not only empowered, but, in the nature of things, had authority to call to his assistance this boy, who never for a moment doubted his authority or hesitated to obey. In mending the belt, and readjusting the machinery, Eastwood was performing a plain duty he owed his principal, and was acting within the scope of his employment. Only four of the seven male hands ordinarily required to run the machinery of the weaving department were on duty that day, the others being absent on leave. In attempting to run the machinery with an insufficient number of hands, Eastwood was compelled, in the course of his regular duty, to call for help. He called this boy, and ordered him into a position of danger, the result of which was irreparable injury to him. In so doing, Eastwood was the representative of his principal, and his order, his negligent want of proper care and caution, was the negligent order and want of proper care of Eastwood's principal; and liability for the consequences cannot be avoided by the contention that Eastwood had no authority, and should not have given the order. The defendant company is liable on the plain principle of *respondeat superior*, Eastwood being then and there its *alter ego*: Wharton's Law of Negligence, sec. 232; *Malone v. Hathaway*, 64 N. Y. 5; 21 Am. Rep. 573. The company is also liable on the ground that by the act of its agent it exposed the boy to perils outside of the ordinary risks incident to his contract of service": *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401; 4 Am. Rep. 616.

We extract the following from the note following *Fisk v. Central Pacific R. R. Co.*, 72 Cal. 38, 1 Am. St. Rep. 22, 28, which we adopt as expressing our views: "Notwithstanding some general declarations to the contrary, which may occasionally be found in the reports, there is no question that the law recognizes some distinction between the duty which a master owes his adult servant or employee, and that which he owes to an employee, who, from his youth or inexperience, or other mental immaturity or infirmity, is not able, without instruction, to understand the perils to which he is exposed in the course of his employment. This distinction, as near as we can express it, is this: that as to the latter class of servants, the master must give them full instructions with re-

spect to the dangerous character of the machinery with or about which they are employed, and of the means necessary to be used to avoid those dangers": See *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Louisville etc. R'y Co. v. Frawley*, 110 Id. 18.

In *Jones v. Florence Mining Co.*, 66 Wis. 268, 57 Am. Rep. 269, the learned judge delivering the opinion said: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." That case, in its facts, is very much like the case we are considering.

In *Dowling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298, the conclusion of the court is stated as follows: "An inexperienced boy of seventeen, employed to work on visibly dangerous machinery, is entitled to warning of the danger from his employer": See *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542.

There is another class of cases where the master will not be relieved from liability for injuries to his servant who is required to perform dangerous and hazardous work, even though the dangers and hazards of the work are open and visible, and warning and instruction are given, as when the servant is so young and inexperienced as not to be able to comprehend and guard against the dangers and hazards to which he is exposed: *Pittsburgh etc. R'y Co. v. Adams*, 105 Ind. 151.

In *Hickey v. Taaffe*, 105 N. Y. 26, the rule is declared to be as follows: "There is no doubt that in putting a person of immature years at work upon machinery which in some aspects may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position, and the necessity there is for the exercise of care and caution; merely going through the form of giving instruction, even if such form included everything requisite to a proper discharge

of his duties by such employee, if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand in fact its dangerous character, and be able to appreciate such dangers, and the consequences of a want of care, before the master will have discharged his whole duty to such employee": *Sullivan v. India Mfg. Co.*, *supra*; *Finnerty v. Prentice*, 75 N. Y. 615. But in the opinion from which we have last quoted the court further says: "If a person is so young that even after full instructions he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk."

In *Hill v. Gust*, 55 Ind. 45, the learned judge who wrote the opinion said: "This exposition of the law is based upon the theory that an employer is bound, under the law, to give a person of tender years whom he employs due caution, explanation, and instruction when he sets him to work in a dangerous and hazardous place. That the mere fact that he could have seen that such place was dangerous and hazardous by exercising his faculty of sight is not of itself sufficient evidence to hold an employee accountable for contributory negligence; but that is a question for the jury to determine from all the facts." The mind of an inexperienced boy who has but reached the immature age of ten years is incapable of comprehending and guarding against dangers and hazards that attend the coupling of railroad cars, and he is without the physical strength required to perform the work successfully; and if directed by his employer, or those under whose direction and command he is placed, to perform such dangerous and hazardous work, and while thus engaged he suffers injury, the employer is liable: See *St. Louis etc. R'y Co. v. Valirius*, 56 Ind. 511; *Jones v. Old Dominion Cotton Mills*, *supra*.

As we have seen, it is alleged in each paragraph of the complaint that the appellee was placed under the control of one Mushett, who was the appellant's weigh-boss at the mine, and had control of all the workmen and work at and about the top of the mine, including the work on and about the cars delivered there to be loaded with coal; and it is alleged in the first paragraph that Mushett ordered the appellee to assist Haines, who was also under his control, in switching the cars that were on the switch to be loaded, and were loaded, and at

the proper time to make the couplings; and in the second paragraph it is alleged that Haines, in the presence and with the knowledge, acquiescence, and consent of Mushett, directed, ordered, and compelled the appellee to quit his regular work, and to assist them in switching and coupling the said cars.

We do not apply the rule which maintains in cases where one servant is injured because of the negligence of a fellow-servant, and which was applied in *Brazil etc. Coal Co. v. Cain*, *supra*, because, as we have seen, this case does not belong to that class; nor do we rest our conclusion upon the maxim *respondeat superior*. Mushett (if not Haines), under the circumstances of this case, was the agent of the appellant, and the superior of the appellee; it was his right to command, and the appellee's duty to obey, and considering the immature age of the appellee, we must assume that he obeyed the commands of his superiors, supposing that it was his duty so to do, without regard to the dangers or hazards that he would encounter, and without a knowledge thereof.

It is said in the case of *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205: "In this case, Smith had charge of the train, and of the men employed with it. In what he did, he was not purposely committing any wrong outside of the employment, but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose, not to injure Williams, but to advance the interest of the railway company. As between the company and any other than a fellow-servant, there could be no question that his act should be deemed the act of the company. But we also think that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it that the master is excused from responsibility; and a risk of this nature not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent": See *Lalor v. Chicago etc. R. R. Co.*, *supra*.

We take the following, which is very much in point, from *Dowling v. Allen*, *supra*: "Nor do we think that, in this instance, King, who gave the plaintiff the order to stop the engine, was plaintiff's fellow-servant. While it appears that Fisher was foreman of the establishment, King had charge of the construction of the turn-table, and Fisher directed plaintiff

to go with King, and do whatever he directed. Here King was foreman of the hands constructing the turn-table. They were under him, and the plaintiff was expressly ordered by Fisher to do whatever King told him": See *Jones v. Florence Mining Co.*, *supra*; *Jones v. Old Dominion Cotton Mills*, *supra*; *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261; 56 Am. Rep. 382; *Corcoran v. Holbrook*, 59 N. Y. 517; 17 Am. Rep. 369; *Railroad Co. v. Fort*, *supra*; *Atlas Engine Works v. Randall*, 100 Ind. 293; 50 Am. Rep. 798; *Chicago etc. R'y Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282; Wood on Master and Servant, sec. 350.

The point is made that the facts constituting the compulsion alleged in the second paragraph are not set out, and that it was necessary to plead the facts.

We are of the opinion that the paragraph would have been sufficient had the word "compelled" been omitted, but were it not, the infirmity was not reached by a demurrer, but a motion to make more specific should have been made. This has been decided over and over again as to the charge of negligence, and we know of no reason why the rule should not be the same when a compulsive act is alleged: *Louisville etc. R'y Co. v. Jones*, 108 Ind. 551, and cases cited.

What we have already said disposes of the third error alleged, that the court erred in overruling the motion in arrest of judgment.

We have examined the instructions given by the court of its own motion, as well as those asked for by the appellant and given, and our conclusion is, that if any error is to be found therein, the appellant was the party benefited, and has no cause to complain.

One suggestion made by appellant's counsel in reference to the sixth instruction we will notice specially. It is contended that the instruction relates to the second paragraph of the complaint altogether, and to the act of compulsion therein alleged, and that it must have misled the jury, for the reason that there was no evidence introduced tending to show compulsion. Giving to the word "compelled" the definition contended for by counsel, and remembering the age of the appellee, and that he was in the presence of two stalwart men, and under the control and command of one of them, we think it was a question for the jury as to what would amount to compulsion. Evidently, it would not require the exercise of as great will-power to compel obedience on the part of a boy ten years

old as would be necessary in the case of a strong, stalwart man.

We are not prepared to say that the preponderance of the evidence was with the appellee, if we are governed by the number of witnesses on either side, and the ground covered by their testimony; but the weight of the evidence and credibility of the witnesses were questions,—1. For the jury; and 2. For the court in which the case was tried.

The appellee testified that he was never instructed as to the manner of coupling cars or its dangers; that Mushett and Haines both, on the occasion in question, told him to knock out the block and couple the cars. That he received his injuries while coupling cars at the mine, and during the time he was in the employment of the appellant, is not controverted.

We find no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

MASTER AND SERVANT. — **INFANT EMPLOYEES**, duty of master to warn them of the dangers incident to the employment, and to instruct them as to the means of avoiding such dangers: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 29-31.

PLEADING. — **UNCERTAINTY IS NOT GROUND OF DEMURRER** under Indiana Code of Procedure: *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; and see *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612.

OBJECTION THAT PLEADING SHOULD HAVE BEEN MORE SPECIFIC comes too late after an issue has been formed upon the general averments of a petition or counterclaim, and a verdict or judgment has been rendered: *Boughner v. Black*, 83 Ky. 521; 4 Am. St. Rep. 174.

BRUCE v. BISSELL.

[119 INDIANA, 525.]

DEGREES OF KINDRED ARE COMPUTED IN INDIANA ACCORDING TO RULES OF CIVIL LAW, and the statute of descents covers every conceivable state of circumstances that can surround the descent of property.

REAL ESTATE OF INTESTATE DESCENDS TO GREAT-GRANDMOTHER under section 2471, Revised Statutes of 1881, as being the next of kin in equal degree of consanguinity, in preference to a great aunt or uncle of the same paternal or maternal line.

REMAINDER VESTS WHEN. — It is a general rule that where a particular estate is created by will, with remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the enjoyment of the prior estate determines, and not as designed, in the absence of express words or a manifest intent to that effect, to postpone the vesting of the remainder over. Where,

therefore, a testator devised land to his daughter for life, with remainder over in fee to her child or children in case she should survive him, leaving a child or children, and by a subsequent clause of the will devised to his widow a life estate in the same land, and after her death to his right heirs in fee; and the daughter, having survived the testator, died shortly after, leaving a son, who also died, leaving a son, who died unmarried and without issue, leaving the testator's widow, his great-grandmother, as his next of kin, — it was held that the testator's grandson took a vested remainder in fee, which was not affected or cut down by the doubtful expressions in the subsequent clause of the will, and that it passed to the testator's widow upon the death of her great-grandson.

ACTION to recover possession of real estate. The opinion states the case.

R. W. McNeal, for the appellants.

J. E. McDonald, J. M. Butler, A. H. Snow, F. Winter, J. B. Elam, J. S. Duncan, C. W. Smith, W. L. Taylor, A. B. Young, F. W. Morrison, S. M. Shepard, C. Martindale, C. E. Barrett, B. F. Davis, and W. H. Martz, for the appellees.

MITCHELL, J. This action was brought by James A. and John W. Bruce against George P. Bissell, and about one hundred others, to recover the possession of certain real estate lying within the limits of the city of Indianapolis. The plaintiffs claimed title under the last will and testament of William Reagan, who died on the fifth day of April, 1847, the owner of the land in controversy, while the defendants in like manner assert title as purchasers through one whom they claim took it as devisee from the testator. The judgment from which this appeal is prosecuted was adverse to the plaintiffs below, and whether that judgment shall be affirmed or reversed depends upon the construction to be given to the will, under or through which both parties claim. So much thereof as is material reads as follows: —

“I give and bequeath unto my daughter Rachel Johnson, wife of Jeremiah Johnson, a tract of land on which she now lives, lying and being in Marion County, known as the south half of the southeast quarter of section number 25, in township number 16 north, of range 3 east, for and during her natural life, provided she shall be living at the time of my death, and after her death, to the child or children of her body lawfully begotten who may survive her, in fee-simple. But if she, said Rachel, should die before me, and leave such child or children living at my death, then, in that event, I bequeath said land to said child or children in fee-simple. But

should she, said Rachel, be living at the time of my death, and afterwards die, leaving no such child or children, then I give and bequeath said tract of land to said Rachel for life. Remainder to my right heirs in fee-simple.

"I give and bequeath to my daughter Dovey Bruce, wife of George Bruce, the north half of the aforesaid tract of land for and during her natural life, provided she shall be living at the time of my death, and after her death, to the child or children of her body lawfully begotten who may survive her, in fee-simple. But if the said Dovey should die before me, and leave such child or children living at my death, then and in that event I bequeath said tract of land to said child or children in fee-simple. But should the said Dovey be living at the time of my death, and afterwards die, leaving no such child or children, then I give and bequeath said tract of land to said Dovey for life. Remainder to my right heirs in fee-simple.

"It being my express intention that my said daughters shall respectively enjoy said tracts of land above described and bequeathed during their respective natural lives, and after their and each of their deaths to descend in fee-simple respectively to the child or children of their bodies lawfully begotten that may survive them, respectively, and survive myself, and in default, then to go to my right heirs in fee-simple.

"I give and bequeath to my beloved wife, Nancy, during her natural life, the farm on which I now live, known as the southeast quarter of section number twenty-five, in township number sixteen (16) north, of range three east, and after her death, to my right heirs in fee-simple, except the said Rachel Johnson and Dovey Bruce and their descendants."

The facts are obscurely or incompletely stated in the record and briefs, but, as we understand the record, the land involved in the present litigation is that described in the first paragraph above, and was devised to Rachel Johnson for life, with remainder over to her children. The same land is embraced by the description contained in the last clause of the will, and is devised to the testator's widow for life, together with the north half of the same tract, which is disposed of by the second clause above set out.

The widow and both daughters survived the testator, Rachel having at the time of his death one son, Harrison L. Johnson, who was her only child. She survived her father only nineteen days, her death having occurred on the twenty-fourth day

of April, 1847. Harrison L. Johnson died intestate on the fifteenth day of September, 1856, leaving John W. Johnson as his sole heir. The latter died on the twenty-seventh day of December, 1872, unmarried and without issue, leaving Nancy Reagan, his great-grandmother, as his next of kin under the statute.

Nancy Reagan, assuming that she took a life estate in the whole farm under the last clause of the will of her husband, continued in possession, and in 1873, claiming to have inherited the south half in fee from her great-grandson John W. Johnson, she sold and conveyed it to George Bruce. The land was afterwards platted into streets, alleys, and lots. The defendants claim through the conveyance to George Bruce, as his near and remote grantees, while the plaintiffs, the only children and heirs of Dovey Bruce, assert that by the terms of the will of William Reagan they are the owners, and entitled to the immediate possession, as the right heirs of the testator, to whom the land was devised upon a contingency which they claim has happened.

It was settled by the judgment of this court in *Cloud v. Bruce*, 61 Ind. 171, that degrees of kindred are computed in this state according to the rules of the civil law; that the statute of descents covers every conceivable state of circumstances that can surround the descent of property; and that, under section 2471, Revised Statutes of 1881, the real estate of an intestate descends to a great-grandmother, as being "the next of kin in equal degree of consanguinity," in preference to a great aunt or uncle of the same paternal or maternal line. It is hence settled by the above decision that whatever interest John W. Johnson, the grandson of Rachel Johnson, had in the land at the date of his death, was inherited by his great-grandmother, Nancy Reagan, through whose conveyance the appellees claim title.

On the appellants' behalf it is contended that the intention of the testator, as expressed in his will, was, that his widow, Nancy Reagan, should enjoy the entire estate during her natural life, and that upon her death it should vest in equal moieties in his two daughters, Rachel Johnson and Dovey Bruce, as provided in the first and second clauses of the will, to be enjoyed by them during their respective lives, and upon the death of the daughters respectively, with a child or children surviving, the fee-simple was then to vest in their child or children respectively, and in the event of the death of

either, leaving no child or children, then the share so devised was to go to the right heirs of the testator. Hence the argument proceeds, since Nancy Reagan, in whom was vested the paramount life estate, outlived her daughter Rachel Johnson, and all her lineal descendants, neither the daughter nor her son, Harrison L., both of whom were alive at the death of the testator, ever took any vested interest in the land, which, according to the appellants' insistence, was carried by the last clause of the will, upon the termination of the precedent particular estate, by the death of Nancy Reagan, to them as the right heirs of the testator.

The error which pervades the argument is fundamental, and lies in the assumption, that because the enjoyment of the successive estates was postponed until the particular estate which preceded it should determine, therefore the successive estates created by the will did not vest in the respective devisees upon the death of the testator, but continued in abeyance until the happening of the events which were to determine the prior estate.

The general rule is, where a particular estate is created by will, with a remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the enjoyment of the prior estate determines, and not as designed, in the absence of express words, or a manifest intent to that effect, to postpone the vesting of the remainder over: 2 Jarman on Wills, 407. So where a remainder is limited over to a class which is liable to be increased during the continuance of the prior estate, the remainder will not be held in abeyance, but will vest at the testator's death in those of the class who answer the description, subject to open and let in after-born members: Tiedeman on Real Property, sec. 402.

It is familiar law that, in the absence of a clear manifestation of the intention of the testator to the contrary, estates shall be held to vest at the earliest possible period. The intent to postpone the vesting of the estate must be clear and manifest, and must not arise by mere inference or construction. It is likewise well settled that "the law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested": *Doe v. Considine*, 6 Wall. 458, 475; *Amos v. Amos*, 117 Ind. 19; 117 Id. 37; *Harris v. Carpenter*, 109 Id. 540; *Hoover v. Hoover*, 116 Id. 498, and

cases cited. "An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determines whether or not the estate is vested or contingent": *Hoover v. Hoover, supra*; *Croxtall v. Shererd*, 5 Wall. 268; Tiedeman on Real Property, sec. 401.

When the testator whose will is involved in the present case died, his widow, Nancy Reagan, his daughter Rachel Johnson, and her son, Harrison L. Johnson, to whom he had devised particular and ulterior estates respectively in the land in controversy, were all alive. A will takes effect at, and is to be regarded as speaking from, the date of the death of the testator; and words of survivorship found therein, unless there is a manifest intent to the contrary, always relate to those who are then in being and survive the testator. By the first clause of the will, the land in dispute was devised to Rachel Johnson for life, provided she should be living at the time of the testator's death, and after her death, to her child or children who might survive her. It was provided further, that in the event the testator's daughter Rachel should be living at his death, and yet die without leaving a child or children, then she was to have the land during her lifetime, with remainder over to his right heirs in fee-simple. This was an attempt to create an estate in the nature of a cross-remainder; but, as we have seen, Rachel Johnson died subsequent to the death of the testator, leaving a son, Harrison L. Johnson, in whom the remainder in fee vested upon the death of the testator. The contingency never arose upon which the cross-remainder was to take effect. It is unnecessary, therefore, to consider that feature of the will further.

It may be observed that the last clause of the will gave to the widow, Nancy Reagan, an estate for life in the entire tract in clear and unambiguous terms. This clause also contains some expressions in relation to the remainder over after her death, which, when considered in connection with the preceding clauses in the will, are ambiguous. The land in dispute was, however, disposed of in clear and unambiguous terms in the second clause of the will. It was devised to Rachel Johnson for life, with remainder over in fee to her child or children, in case she should survive the testator, leaving a child or chil-

dren, which she did. But for the last clause of the will there would be no room to argue that Harrison L. Johnson did not take the remainder over in fee under this clause of the will; whatever doubt there is arises from the ambiguity created by the latter part of that clause. The rule is, that where an estate or interest is given in one clause of a will, in clear and decisive terms, the interest so given cannot be taken away or cut down by raising a doubt upon the extent and meaning of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate: *Bailey v. Sanger*, 108 Ind. 264, and cases cited; *Hochstedler v. Hochstedler*, 108 Id. 506; *Goudie v. Johnson*, 109 Id. 427; *Allen v. Craft*, 109 Id. 476.

Where two particular estates of the same extent are carved out of same premises, and given to different persons, in the absence of anything to indicate an intention on the part of the testator that the devisees are to be joint beneficiaries, the rule seems to be that the superior estate must elapse before the inferior can begin. In the absence of other evidence as to which is superior, that which is created last in the will is deemed to have the preference: *O'Hara on Wills*, 39, 302.

It is not important, however, that we determine whether Nancy Reagan took the superior life estate in the whole tract, or whether she became a joint beneficiary for life with her daughters. Since the decision depends entirely on the conclusion already enunciated, that Harrison L. Johnson took a vested remainder in fee upon the death of the testator, which was in no wise affected or cut down by the doubtful expressions contained in the last clause of the will, there was no error.

The judgment is therefore affirmed, with costs.

WILLS. — MEANING OF WORD "ISSUE": *Wistar v. Scott*, 105 Pa. St. 200; 51 Am. Rep. 197; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399; construction of words "next of kin": *Keteltas v. Keteltas*, 72 N. Y. 312; 28 Am. Rep. 155; *Swasey v. Jaques*, 144 Mass. 135; 59 Am. Rep. 65.

REMAINDER CANNOT BE LIMITED TO TAKE EFFECT after a fee; in other words, "where there is no reversion, there can be no remainder": *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420.

VESTED REMAINDER IS DISTINGUISHED FROM CONTINGENT REMAINDER by the present capacity of taking effect in possession, if the possession were to become vacant: *Mercantile Bank v. Ballard*, 83 Ky. 481; 4 Am. St. Rep. 160, and see cases collected in note 167.

SUCCESSION TO ESTATES OF INTESATES: See note to *In re Ingram*, ante, p. 81.

LOUISVILLE AND NASHVILLE R. R. Co. v. CRUNK.

[119 INDIANA, 542.]

MOTION TO MAKE COMPLAINT MORE SPECIFIC, PROPERLY DENIED WHEN.

— Where a complaint in an action against a railroad company to recover damages for personal injuries sustained by the plaintiff alleges that the injuries were caused by the defendant's suddenly and greatly accelerating the speed of its train while the plaintiff was in the act of stepping off at a depot, it is not error to overrule a motion to make the complaint more specific by stating what agent or employee of the defendant caused the motion of the train to be suddenly and greatly accelerated, and what acts of such agent caused the motion to be suddenly and greatly accelerated, and by showing how or in what respect such acts of said agent were negligent and wrongful.

MOTION FOR JUDGMENT ON ANSWERS TO INTERROGATORIES NOTWITHSTANDING GENERAL VERDICT will be sustained only where there is a direct conflict between the general verdict and the interrogatories and answers thereto, and where the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment.

FACT OF PERSON'S VOLUNTARILY ALIGHTING FROM MOVING TRAIN IS NOT CONCLUSIVE PRESUMPTION OF NEGLIGENCE on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting are to be taken into consideration in determining whether or not he was guilty of negligence in leaving, or attempting to leave, the train.

SICK PASSENGER, OBLIGATION OF RAILROAD COMPANY TO ASSISTANTS CARRYING INTO TRAIN. — Where a passenger is sick, and in so enfeebled a condition as to require assistants to carry him from the station to a seat in the train upon which he has secured a passage, the railroad company, having contracted to carry him with knowledge of his condition, is under obligation to stop the train long enough to allow the assistants a reasonable time to leave the train as it would have been had they been passengers on the train, although they voluntarily offered their services.

LIABILITY OF RAILROAD COMPANY FOR INJURY CAUSED BY SUDDEN INCREASE OF SPEED. — If a person rightfully enters a railway train at a station to assist in carrying a sick passenger to a seat in the car, and the train is started before he has had a reasonable time to get off, at a rate of speed so slow as to enable him to alight in safety, but while he is about to step from the platform the speed of the train is suddenly and greatly increased through the negligence of the persons in charge of the train, and he is thrown off and injured, the company is liable.

ACTION for personal injuries. The opinion states the case.

S. B. Vance, J. M. Shackelford, and W. J. Wood, for the appellant.

A. P. Hovey, G. V. Menzies, and W. Loudon, for the appellee.

OLDA, J. This is an action by the appellee against the appellant for damages resulting from injuries to the appellee by reason of the negligence of appellant's employees in failing to stop a passenger train at a railway station a sufficient length

of time to allow appellee to get off in safety, and in suddenly accelerating the speed of the train when appellee was in the act of stepping off.

As some question is made as to the negligence charged in the complaint, we state the principal averments, which are as follows: That the defendant, before and at the time of the grievances complained of, was, and now is, the owner of a railroad known as the Louisville and Nashville Railroad, running from the city of Evansville, Indiana, by and through the city of Mt. Vernon, Indiana, and other cities and towns, to the city of St. Louis, in the state of Missouri, and with their locomotive-engines and trains of cars, moved and propelled by steam, were, at said time, engaged in carrying and conveying passengers over said railroad for hire, and said defendant, on the thirteenth day of December, 1885, agreed and undertook for hire to carry over their said railroad, as a passenger, one George Naas, from said city of Mt. Vernon to said city of St. Louis; that said Naas was, at said time, from long protracted sickness, so weak and infirm in body as to be unable to rise from his bed without assistance, of which sickness and infirmity of the said Naas the defendant, at the time aforesaid, had due notice; that, by reason of said infirm and feeble condition of said Naas, it was, at said time, necessary for him to be carried from the station of the defendant at Mt. Vernon and placed upon the cars of the defendant for the purpose of commencing said journey to St. Louis; that the plaintiff, with other friends of said Naas, undertook to assist in carrying said Naas, at said time, from the station of the defendant at Mt. Vernon, and to place him upon the cars, at the time ready for the reception of passengers at said place, the defendant at the time agreeing with and promising said Naas—of which agreement and promise the plaintiff had knowledge before he took upon himself said charge and burden aforesaid—that the defendant would stop its locomotive-engine and cars at said station a sufficient length of time not only to permit the said Naas to be carried aboard the said cars by the plaintiff and other friends of said Naas, but also a further time sufficient for the plaintiff and other assistants to leave the cars in safety; that upon the arrival of said defendant's train of passenger-cars at their station at Mt. Vernon on said day, none of the defendant's servants, agents, or employees aided, or offered to aid, in carrying said Naas on board of the said defendant's cars, and thereupon the plain-

tiff, with the assistance of two other friends of said Naas, relying upon said promise and agreement of said defendant so made with said Naas, and by him theretofore communicated to plaintiff, forthwith proceeded, in the presence and view of the defendant's agents and servants who had charge and control of said train, to carry, and did with the utmost dispatch carry, said Naas from said station and place him upon one of the cars of the defendant, to be by the defendant carried as a passenger over its said railroad to said city of St. Louis, in pursuance of its agreement; that upon placing said Naas on board of said car, the plaintiff and said other assistants immediately thereafter proceeded to leave said car without delay; that the defendant caused its said locomotive-engine and train of cars to be slowly moved forward at the instant the plaintiff and the other assistants began leaving said car; that said other assistants stepped from said car upon defendant's platform at said station while said cars were slowly moving forward as aforesaid, without difficulty and without injury; that he, the said plaintiff, was following so closely behind said other assistants when they so stepped off that he could easily have laid his hand upon them, and was making reasonable haste in getting off said car, as the defendant then and there well knew, but at the instant he was in the act of stepping off the lower step of the platform of said car upon the platform of said station, the defendant negligently and wrongfully caused the motion of said car to be suddenly and greatly accelerated, by reason whereof the plaintiff was, without any fault or negligence on his part, thrown violently upon and from the platform of said station, and upon the track of the defendant's railroad, and the said cars of the defendant, without any fault or negligence on his part, ran upon and over his right foot and ankle, crushing the bones thereof to such an extent as that four of his toes had to be amputated. Then follow further allegations as to the nature and extent of the injury.

There was a demurrer filed to the complaint, and overruled, and that ruling is assigned as error, but it is not discussed by counsel, and is therefore waived.

The appellant filed a motion to require the appellee to make the complaint more specific, by stating and showing what agent or employee of the defendant caused the motion of the cars to be suddenly and greatly accelerated, and what acts of such agent caused the motion of the cars to be suddenly and

greatly accelerated; also, that he be required to show how, or in what respect, such acts of said agent were negligent and wrongful. The motion was overruled, and this is complained of as error. The motion was properly overruled. The pleading must be construed in the light and knowledge possessed by mankind of the manner and by whom passenger trains are run and operated, and the allegations of the complaint are to be treated as relating to and meaning the employees and agents of the defendant running and operating the train of cars, and are sufficiently certain and specific. Furthermore, the plaintiff is not bound to plead facts which are peculiarly within the knowledge of the defendant.

The appellant moved for judgment in its favor on the special findings, notwithstanding the general verdict; this motion was overruled, and the ruling assigned as error.

The answers to interrogatories showed the following facts: That the plaintiff went upon the train to assist Naas, at the request of the family; that the train was in motion before plaintiff left the car in which Naas was seated, and when he was upon the platform for the purpose of leaving the train, and that plaintiff knew it was in motion; that the train was moving at the rate of four and one half miles an hour when plaintiff got on the lower step for the purpose of alighting from the train.

The answers to the fourth and fifth interrogatories are conflicting. The fourth interrogatory and answer are to the effect that neither the conductor nor engineer in charge of the train and engine knew that plaintiff was on the steps of the car, or that he purposed leaving the train, or that he was in the act of alighting from the train at the time he did attempt to leave it. Interrogatory 5 and answer are to the effect that the conductor knew that the plaintiff was on the train when it started, and that he purposed leaving the train before he had left it. This leaves the interrogatories showing this state of facts, viz.: That plaintiff went upon the train to help Naas, at the request of Naas's family; that the train was in motion before he left the car, and continued in motion until plaintiff got on the step for the purpose of leaving, and that he knew the train was in motion; that when he was upon the lower step for the purpose of alighting from the train, the train was moving at the rate of four and one half miles an hour, and that the conductor knew plaintiff was on the train, but did not know he was upon the

steps of the car, or was in the act of alighting, when he made the attempt to leave the train.

The answers to interrogatories did not entitle the appellant to judgment. It is only where there is a direct conflict between the general verdict and the interrogatories and answers thereto, and where the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment, that a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, will be sustained: *McClure v. McClure*, 74 Ind. 108; *Grand Rapids etc. R. R. Co. v. McAnnally*, 98 Id. 412.

In the case of *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88, 96, it is held that all reasonable presumptions are indulged in favor of the general verdict, while nothing will be presumed in favor of the special findings. Under these well-settled principles, which have been universally adhered to by this court, there was no error in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. All the facts established by the answers to the interrogatories might be true, and yet the appellee be entitled to recover.

It is insisted by counsel for appellant that the answers to interrogatories show that the train of defendant was in motion before the plaintiff left the car in which said Naas was seated, and when the plaintiff came upon the platform of said car, and when he got on the steps of said car for the purpose of leaving it, as was known to him, and that when plaintiff reached the lower step for the purpose of alighting from the train it was moving at a speed of four and one half miles per hour; and that the law is, that when a railroad station has been announced, and the train has been stopped, there is an invitation to passengers to alight, and an implied promise and an obligation that the stop shall be long enough to give all passengers a reasonable time to leave the train in safety, but after the train has started from the station, and especially when it has obtained a speed which proclaims to every one that the movement is final, there is no longer an invitation to any one to leave the train, and one who thus attempts to leave it does so without the invitation or consent of the railroad company, and at his own risk; that the effect of the finding in this case was, that the train had acquired such speed at the time the appellee alighted as to proclaim to every one that the movement was final, and that the alighting under such cir-

cumstances is a conclusive presumption of contributory negligence, and the appellee cannot recover, and it was the duty of the court to render judgment in favor of appellant; that when the facts show the train to have been moving at the rate of four and one half miles an hour when a person alights from the train, the court shall declare, as a matter of law, that such act of alighting is negligence, and that the person cannot recover, though injury may have resulted to him by reason of the negligence of the employees of the railroad company.

We do not concur in this theory of counsel. The fact that a person voluntarily alights from a moving train is not a conclusive presumption of negligence on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting, are to be taken into consideration in determining whether or not the person was guilty of negligence on his part in leaving, or attempting to leave, the train. The degree of speed which would of itself make the person guilty of negligence in one case, and under some circumstances, would not under others. We do not mean to say that the court would not hold that a person who voluntarily left a passenger train when in full speed was not guilty of negligence, and that such act alone would be construed to constitute such contributory negligence as that he could not recover for injuries received; but like crossing the railroad track, while it might be negligence to attempt to cross the track with horses and vehicles when the train was within a few rods, running at high speed, it might not be when the train was at a much greater distance and running at a less rate of speed, though it was in sight. It might be negligence to attempt the crossing of a track with horses and a vehicle, when it would not be to do so on foot. So, too, what one in the full vigor of manhood might do with perfect safety might be hazardous for one who is decrepit with age or in an enfeebled condition. Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting.

In this case, the passenger Naas being in an enfeebled condition, requiring the assistance of others to carry him upon the train and place him in a seat, the defendant's employees having knowledge of his condition, and observing others carrying him into the car, they owed an obligation to those assisting and carrying him into the car to allow the train to remain

standing a sufficient time to allow them a reasonable opportunity to leave the train, and to those whose assistance was necessary, and whose services in that behalf were accepted by the passenger Naas, the company owed the same duty in allowing them a reasonable time to leave the train as it would had they been passengers upon the train, though they voluntarily offered their services.

In the case of *Evansville etc. R. R. Co. v. Duncan*, 28 Ind. 441, 447, 92 Am. Dec. 322, the court, in speaking of a person leaving a train while in motion, says: "If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it." And this statement of the law by the court is quoted and approved in the case of *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 48. In the case of *Ohio etc. R'y Co. v. Collarn*, 73 Id. 261, 38 Am. Rep. 134, the court states the rule as to when the question of negligence should be submitted to a jury. See also *Pennsylvania Co. v. Long*, 94 Ind. 250; *Town of Albion v. Hetrick*, 90 Id. 545; 46 Am. Rep. 230.

The first cause assigned for a new trial was the giving by the court, at the request of the plaintiff, instructions 1, 2, 3, and 5. We set out some of the instructions. No. 1 is as follows:—

"1. If you believe, from the evidence, that at the time mentioned in the complaint the defendant, for hire, agreed to receive, and did receive, on board its train of cars at its passenger-station at Mt. Vernon, Indiana, one George Naas as a passenger, and that the defendant had knowledge that said Naas was at the time so sick and feeble as to render it necessary for him to be carried into defendant's car, and the conductor of said train, then present, had knowledge, or had reasonable grounds to believe, that the plaintiff entered said car as an assistant in carrying said Naas therein and in seating said Naas in said car, then you may find that the plaintiff rightfully entered said car, and that the defendant owed the plaintiff the same duties, while he was rendering said assistance to said Naas, and while he was leaving said car, that it would owe to any of its passengers for hire."

This instruction was proper. The defendant, in contracting to carry the passenger Naas in his sick and enfeebled condition, contracted an obligation which could only be car-

ried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger, it took upon itself the obligation of allowing him assistants to place him upon the train and seat him in the car, and the compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself.

Instruction No. 2 states the legal obligation of carriers of passengers for hire, and it is not erroneous in connection with the other instructions.

Instruction No. 3: "If you find, from the evidence in this case, and under the instructions I have given you, that the plaintiff rightfully entered the car at its station at Mt. Vernon as an assistant in carrying said Naas into said car, and the conductor of the train of which said car was a portion knew, or ought to have known, at the time, that the plaintiff had, in the capacity of such assistant, entered said car, then you should find that it was the duty of the defendant to cause said car to remain stationary at said station such a length of time as would, in your judgment, under all the circumstances proved, be sufficient to enable the plaintiff to leave the car while it was thus standing; and if you find that the train was started by defendant before such reasonable time had elapsed, and that the plaintiff attempted to leave the car while in motion, but while the motion thereof was yet slow, that a person of ordinary caution and prudence would apprehend no danger in stepping therefrom, and that when the plaintiff was in the act of stepping from the steps of the car-platform to the station-platform, if you should so find the motion of the train was suddenly increased by the fault and negligence of the employees of said road, and that by reason of such sudden increase of speed the plaintiff was thrown onto the track of the defendant, and received the injury complained of, you will find for the plaintiff, unless you further find that he was guilty of want of ordinary care and prudence which directly contributed to produce the injury."

This was a proper instruction, and applicable to the issues in the case. The complaint alleges the contract to carry Naas in his sick and enfeebled condition, the necessity for assistants, and knowledge of such facts on the part of the defendant; that

the plaintiff entered the car as an assistant to Naas. It fairly appears that the train failed to remain standing a sufficient time for the plaintiff and other assistants to leave the car, and that it moved slowly as plaintiff was leaving the car, so that he could have alighted in safety had it not been for the fall. When he was upon the step in the act of alighting, there was a sudden acceleration of speed, caused by the negligence of the employees of defendant operating and running the train, by reason of which plaintiff was thrown violently upon and from the platform, and upon the track, and run over, without fault on his part. And this instruction is based upon the same theory: that if the plaintiff rightfully entered upon the car as an assistant of Naas, and the conductor knew it, or had reason to know it, he should have allowed the train to remain stationary a sufficient length of time for plaintiff to have left the train; and if he failed to do so, and started the train slowly, and continued to run so slowly that a person of ordinary prudence and caution would have apprehended no danger in stepping therefrom, and while the car was thus moving, and the plaintiff was in the act of stepping off onto the platform of the depot, the employees, carelessly and negligently, suddenly accelerated the speed of the car, and by reason of such sudden increase of speed, plaintiff was thrown on the track of the defendant, and received the injury complained of, the defendant would be liable, unless the lack of ordinary care or prudence of plaintiff directly contributed to the injury.

The fifth instruction states the law properly as to the amount of recovery in the event the jury find for the plaintiff, and is not erroneous.

The next error assigned is the refusal of the court to give instructions 1, 2, and 8, requested by the defendant. They all proceed upon the theory that if the plaintiff knew the train was in motion, and, to avoid being carried from Mt. Vernon, attempted to leave the train, and such attempt caused or contributed to the injury, he had no right to recover.

We cannot adhere to the doctrine that the attempt to voluntarily leave a moving train regardless of the speed and circumstances under which the attempt is made is negligence *per se*, and if injury occurs in alighting by reason of the negligence of the employees of the railroad company, that there can be no recovery. Though that doctrine has been held in some cases, yet it is in opposition to the decisions of this court

hereinbefore cited, and we think against the best considered cases of other states.

In the case of *New York etc. R. R. Co. v. Coulbourn*, 69 Md. 360, the court says: "The court rejected the defendant's fourth prayer, and in doing so, we think it committed no error. By that prayer the court was asked to instruct the jury that if they should find that the car was moving at least at the rate of five miles an hour at the time the plaintiff jumped therefrom, then such act of the plaintiff was negligence on his part, and their verdict should be for the defendant. This prayer excluded from consideration all the facts and circumstances of the case under which the plaintiff acted, except the single fact that he jumped from the car when it was moving at the rate of five miles per hour; and if the jury should find that fact, then the court was asked to say, as matter of law, there was such negligence on the part of the plaintiff as would preclude his right to recover, without regard to the other facts of the case. But in our opinion, all the facts and circumstances of the case were properly left to the consideration of the jury; and it was for them to determine, as matter of fact, whether the plaintiff, in jumping from the car, acted as a reasonably cautious man would do under like circumstances": *Cumberland Valley R. R. Co. v. Maugans*, 61 Md 53; 48 Am. Rep. 88; *Filer v. New York etc. R. R. Co.*, 49 N. Y 47; 10 Am. Rep. 327; *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787; *Clemens v. Hannibal etc. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Delamatyr v. Milwaukee etc. R. R. Co.*, 24 Wis. 578; *Strauss v. Kansas City etc. R. R. Co.*, 14 Cent. L. J. 355.

It is proper to consider the further question as to whether there was evidence to support the verdict of the jury, and whether the charges given by the court were applicable to the evidence. We have examined the evidence. There was evidence from which the jury might have reasonably found that Naas was sick, and in such a feeble condition as to require assistance to carry him on board the cars; that defendant's employees had knowledge of his condition at the time of selling him a ticket and contracting to carry him, and that the conductor was notified and saw the assistants carrying him into the cars, and was directed by the agent to give plenty of time; that no time was given to the assistants to leave the train; that the train was in motion by the time Naas was seated; that the train moved slowly until plaintiff was on the

steps and in the act of stepping from the train, when the speed was suddenly increased; some witnesses describe it as moving with a lunge, others with a sudden motion, others that it started suddenly; and that the other assistants, just in front of plaintiff, landed safely. It may have been fairly found that the suddenly increased motion of the car threw the plaintiff upon the track, and that had it not been for that he would have landed safely, and that the employees were guilty of negligence in so moving and running the train.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

PLEADING. — COMPLAINT WHICH BRIEFLY YET CLEARLY sets forth the grievances of which the plaintiff complains is sufficient: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777, and note 781.

NEGLIGENCE. — PERSONS GETTING OFF MOVING TRAINS: *New York etc. R. R. Co. v. Coulbourn*, 69 Md. 360; 9 Am. St. Rep. 430, and note 433. One who in a panic leaps from a railway car while in motion, and is injured, cannot recover therefor in an action against the company, where such panic arose from causes with which it had no connection, and in which it had no agency: *Reary v. Louisville etc. R'y Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497.

CARRIERS. — IT IS DUTY OF CARRIER TO ALLOW PASSENGERS sufficient time to alight: *Hurt v. St. Louis etc. R. R. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374, and note 381. Duty of carrier towards sick or infirm passenger: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and note 499; *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; *Lemont v. Washington etc. R. R. Co.*, 1 Mackey, 180; 47 Am. Rep. 238.

BOULDEN v. McINTIRE.

[119 INDIANA, 574.]

DIVORCE PRESUMED IN FAVOR OF VALIDITY OF SECOND MARRIAGE. — Where a woman contracts a second marriage while her first husband is alive, it will be presumed, in favor of the validity of the second marriage, that the first marriage was legally dissolved by a divorce before the second one was entered into, and one who asserts the invalidity of the second marriage must show that there had been no divorce.

BURDEN OF PROOF OF NEGATIVE RESTS ON PARTY WHEN. — Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. Where, therefore, the right of a claimant to land rests upon the supposed illegality of a marriage, he must, before he can make good that right, by proper proof, remove every presumption of the legality of such marriage.

EVIDENCE INSUFFICIENT TO OVERCOME PRESUMPTION IN FAVOR OF MARRIAGE, WHAT IS. — Where the grantee of a widow who has acquired land through a second marriage contracted by her sues to quiet title

thereto as against the relatives of the second husband, who assert the invalidity of the marriage, a transcript showing that her first husband obtained a decree of divorce from her in the courts of another state, after the execution of the conveyance by her, does not, if admissible evidence at all, overcome the presumption that she had, prior to her second marriage, obtained a divorce.

J. V. Kent, J. W. Merritt, M. Bristow, M. B. Beard, and A. H. Boulden, for the appellants.

J. Claybaugh, T. H. Palmer, and W. F. Palmer, for the appellee.

COFFEY, J. This was an action in the Clinton circuit court, brought by the appellee against the appellants to quiet title to the land described in the complaint. The cause was put at issue by the general denial, and a trial by a jury resulted in a verdict for the appellee. A decree was rendered by the court upon said verdict quieting the title of the appellee to the land in dispute.

The appellants assign as error the ruling of the circuit court in overruling their motion for a new trial. The reasons assigned for a new trial were: 1. That the verdict of the jury is contrary to law; 2. That the verdict of the jury is contrary to the evidence; 3. That the verdict of the jury is not supported by sufficient evidence.

It appears, from the evidence in the cause, that Horace G. Boulden died intestate, the owner in fee of the land in dispute, leaving no children, or descendants of children, but leaving a mother, and brothers and sisters. The said Horace G. Boulden was married to Eliza Street, in Clinton County, Indiana, on the twenty-second day of April, 1879, and he died in 1881, leaving her surviving him. Subsequent to his death she conveyed the land in dispute to Samuel Traver, who conveyed to the appellee in this cause. The appellants are the mother and brothers and sisters of Horace G. Boulden, and resist the claim of the appellee to this land upon the ground that said Horace was not legally married to said Eliza, she at the time of said pretended marriage having a living husband. There is no conflict in the evidence relating to the marriage of Eliza Street prior to her marriage with Horace G. Boulden. It is shown, by the evidence, beyond question, that she was married to Charles Limes, in Fayette County, in the state of Ohio, in the year 1873, and that the said Limes is still living. Indeed, the deposition of Charles Limes is on file in this cause, in which he testifies to the marriage.

It is contended, however, by the appellee, that inasmuch as the presumption of law is against crime, we must presume that Eliza Limes was divorced from her husband, in the absence of some showing to the contrary, and that it was not enough for the appellants to show that she had a living husband at the time of her marriage with Horace G. Boulden, but they must go a step further, and show that she has not been divorced.

In the case of *Yates v. Houston*, 3 Tex. 433, the parties appeared in Texas, as husband and wife, four years after the husband's separation from a former wife. The court held that "the rational presumption after this lapse of time is, that the former wife was dead. . . . The ordinary presumption in favor of the continuance of human life should not, under the facts of the case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their marriage."

In the case of *Hull v. Rawls*, 27 Miss. 471, Mrs. Rawls filed her petition for dower, which was resisted by Hull, the administrator of James C. Rawls, deceased, on the ground that she was not the wife of Rawls, as he had a wife living at the time of his pretended marriage with the petitioner. The proof of the petitioner consisted of the record of her marriage, made in the clerk's office of Kemper County, in that state, showing the marriage was solemnized December 6, 1848. On the part of the administrator it was proved that in 1844 James C. Rawls was living in Chickasaw County with a woman whom he treated as his wife, and that the parties were recognized as husband and wife in the community, and that Rawls had said at one time, in the presence of petitioner, that his former wife was then living in Georgia. The court said: "Aside from the statement of Rawls, there is nothing in the testimony which raises a suspicion against the validity of the marriage. The fact that the deceased was living in 1844 with a woman believed to be his wife is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. . . . If the former wife had been living in Georgia, as stated by Rawls, she would not necessarily be his wife in a legal sense, for they may have been legally divorced."

In the case of *Dixon v. People*, 18 Mich. 84, the defendant was indicted for murder, and the prosecution sought to use

Harriet Dixon, who claimed to be his wife, as a witness; and to show that she was not his wife, and therefore competent to testify, proved to the court that she was married in 1859 to one Phillips, in Livingston County, in that state. The wife was then called, and admitted her marriage to Phillips; but further stated that the last time she saw Phillips was in April, 1860, and had not heard of him since; that in 1862 she saw an account in the newspapers of the death of a man by the name of Phillips, who she supposed to be her husband; that she, believing him to be dead, married the defendant in March, 1865. Under this evidence, she was allowed to testify, and the defendant excepted. Upon the point we are now considering, the court says: "This evidence made a very clear and strong *prima facie* case of a valid marriage in good faith with the defendant; since, without reference to the newspaper report, the presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive—rendered it obligatory upon the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of the marriage with the defendant."

In the case of *Harris v. Harris*, 8 Brad. App. 57, Harris sought to obtain a divorce from his wife, on the ground that she had another husband living at the date of their marriage. The court, in discussing the question now under consideration, said: "When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations; and the fact, if shown, that either or both of the parties have been previously married, and of course at a former time having a wife or husband living, does not destroy the *prima facie* legality of the last marriage. The natural inference in such case is, that the former marriage has been legally dissolved, and the burden of showing that it has not been rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved, either by the death of their former consort or by decree of the court, in order to protect themselves against a bill for divorce or a prosecution for bigamy."

In the case of *Greensborough v. Underhill*, 12 Vt. 604, the court says: "Is the intermarriage of Burdick with the pauper,

in 1836, rendered illegal and void from the fact of her inter-marriage with Hyland in 1834, who, after a short cohabitation with her, absconded, and has not since been heard of? To render the second marriage illegal and void, we must presume the continuance of the life of Hyland down to the time of the second marriage; and though, as a general principle, we are to presume the continuance of life for the space of seven years, still, when this presumption is brought into conflict with other presumptions in law, it may be made to yield to them. We are in all cases to presume against the commission of crime, and in favor of innocence; and the result will be, if we suffer this presumption to yield to the other, we, by presumption alone, pronounce the second marriage illegal and void, and the parties guilty of a heinous crime. . . . In the case of *Rex v. Twining*, 2 Barn. & Adol. 386, the woman married again within the space of twelve months after her husband had left the country; and yet the presumption of innocence was held to preponderate over the usual presumption of the continuance of life, and this, too, in a case involving a question of settlement."

In the case of *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742, William H. Clayton, at the time he was formally married to Mrs. Hannah A. Teter, had a wife living in the state of Ohio. At a time subsequent to this marriage, Mrs. Clayton, the first wife, obtained a divorce in Greene County, this state. Clayton and his second wife lived together as husband and wife after the granting of the divorce, and it was held that the law presumed a good common-law marriage after such divorce was granted. Elliott, J., who delivered the opinion in that case, said: "The presumption in favor of matrimony is one of the strongest known to the law. . . . 'The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy.'"

In the case of *Squires v. State*, 46 Ind. 459, the defendant was prosecuted for bigamy. The only evidence tending to prove that the first wife was alive at the time of the second marriage was that she was living in Buffalo, New York, two years previous to the second marriage. The defendant was convicted. It was held by this court that this was no proof that she was living at the date of the second marriage, and the cause was reversed.

The presumption of the death of the former husband or wife, in the case of second marriage, is only one of the many

presumptions the law indulges in favor of the validity of the second marriage. As the authorities cited abundantly establish, every presumption is to be indulged as against the illegality of such a marriage. If the law will presume the termination of the former marriage relation by the death of one of the parties to it, why not indulge any other presumption which might legally terminate that relation? We think, where the facts are not such as to destroy such a presumption, that a dissolution of the first marriage by divorce will be presumed in favor of the validity of the second marriage.

In the case of *Klein v. Laudman*, 29 Mo. 259, the plaintiffs brought suit for slander. They proved their marriage, but the defendant proved declarations of the wife that she had married in Germany to another man. The court says, in that case: "There was no presumption that a marriage, which was proved to have existed at one time in Germany, continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is, that the conduct of parties is in conformity to law, until the contrary is shown. That a fact, continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption of equal, if not greater, force in favor of innocence. . . . There was not any evidence that the first husband of Mrs. Klein was still living; but if this had been established, we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce."

Mr. Bishop, in his valuable work on marriage and divorce, volume 1, section 457, uses this language: "Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality; not only casting the burden of the proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption, that it is illegal and void. So that it cannot be tried like ordinary questions of fact, which are independent of this sort of presumption."

In this case, Eliza Street intermarried with Charles Limes, in Fayette County, in the state of Ohio, in December, 1873. She and her husband separated within a few weeks after the marriage, never having kept house. She removed to Indiana

soon after the separation, and on the twenty-second day of April, 1879, under her maiden name of Eliza Street, was in due form of law married to Horace G. Boulden. She lived with him as his wife until his death, which occurred in the year 1881. She subsequently intermarried with one Abijah Stewart, and died some time before the trial of this cause. It will thus be seen that she had been living separate and apart from Limes for a space of between five and six years before she married Boulden. In the absence of proof to the contrary, it would undoubtedly be presumed, in favor of the validity of her marriage with Boulden, that Limes was dead. In the absence of any showing to the contrary, what reason can be assigned, under the circumstances, for not presuming that the marriage relation between her and Limes had been dissolved by a legal divorce before her last marriage?

It is urged that to require the appellants to prove that Eliza Street had not be divorced from Charles Limes prior to the date of her marriage with Boulden would be requiring them to prove a negative.

As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue and prove it, though it may involve the proving of a negative.

The practice of requiring a party to prove a negative is not new in Indiana. The case of *Goodwin v. Smith*, 72 Ind. 113, was an application by Goodwin to obtain a license to retail intoxicating liquor. It was held in that case that the petitioner was required to prove that he was not in the habit of becoming intoxicated, though such requirement involved the proving of a negative. In that case, Elliott, J., who wrote the opinion, collected the authorities upon this subject, from which it appears that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative: *Smith v. Zent*, 59 Ind. 362; *Carey v. Sheets*, 67 Id. 375; *Cummings v. Parks*, 2 Id. 148; 2 Greenl. Ev., sec. 454; *Smith v. Bettger*, 68 Ind. 254; 34 Am. Rep. 256. Many illustrations of the rule are found in these authorities, but we do not deem it necessary to lengthen this opinion by setting them out.

The right of the appellant to the land in dispute rests upon the supposed illegality of the marriage between Eliza Street and Horace G. Boulden, and in our opinion, before they can make good that right, they must, by proper proof, remove every presumption of the legality of such marriage.

There appears in the record a transcript from the common pleas court in the state of Ohio, from which it appears that Charles Limes obtained a divorce from Eliza Limes on the twenty-sixth day of May, 1883. The land in dispute was conveyed by Eliza Boulden to Samuel Traver on the seventeenth day of December, 1881, and we are at a loss to know upon what ground this record was admitted in evidence against appellee in this cause. The parties could neither say nor do anything that could affect the title to this land after the execution of the deed. It may well be doubted as to whether this record, if admissible in evidence under the circumstances in this case, tended to prove that Eliza had not previously obtained a divorce from Charles Limes in the courts of Indiana; at least, it is not conclusive upon that question. It is shown that she had resided in this state many years prior to the date at which the divorce was granted to Charles Limes in Ohio, and was a resident of this state at the time, residing in Clinton County as the wife of Abijah Stewart. Our conclusion is, that the jury were authorized to find that there was not sufficient evidence in this cause to remove the presumption in favor of the legality of the marriage between Eliza Street and Horace G. Boulden, and that the evidence in the cause tends to support their verdict. In this conclusion we do not desire to be understood as fixing what would be the rule in cases of prosecutions for bigamy, where the defendant was living and presumed to be possessed of the evidence establishing the granting a divorce. There may be, and perhaps is, a distinction between that class of cases and the one at bar, where the party alleged to have been guilty of bigamy is dead, and the contest is over the property.

We find no error in the record for which the decree of the circuit court should be reversed.

Judgment affirmed.

MARRIAGE AND DIVORCE. — FROM CELEBRATION OF MARRIAGE, LAW PRESUMES contract of marriage, the capacity of the parties, and everything essential to a valid marriage: *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 115, and note 117. A legal divorce may be presumed in favor of the validity of a second marriage, though there is no direct evidence thereof: *Blanchard v. Lambert*, 43 Iowa, 228; 22 Am. Rep. 245.

EVIDENCE. — BURDEN OF PROOF when right is dependent on a negative: *Goodwin v. Smith*, 72 Ind. 113; 37 Am. Rep. 144; *Prideaux v. City of Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Great Western R. R. v. Bacon*, 30 Ill. 347; 83 Am. Dec. 199, and note 200.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

WILLIAMS v. GLENN'S ADMINISTRATOR.

[87 KENTUCKY, 87.]

JUDICIAL SALES. — After confirmation of a judicial sale of real estate the rule *caveat emptor* applies, and the purchaser cannot successfully resist the payment of the purchase price on the ground that he acquired no title, unless he can show that he was induced to make the purchase by misrepresentations of the creditor, or person making the sale, as to the condition of the title, and that he did not discover, and could not have discovered with due diligence, the true condition of the title until after such confirmation.

O. W. and A. T. Root, for the appellants.

D. A. Glenn and A. G. Winston, for the appellee.

BENNETT, J. In an action pending in the Campbell circuit court by John Glenn's administrator against George B. Hodge, etc., the court decreed a sale of the land in controversy as the property of George B. Hodge, to satisfy a mortgage debt thereon which mortgage was executed by George B. Hodge to the appellee's intestate. At the master commissioner's sale of said land, the appellant Williams became the purchaser. He executed bonds to the commissioner for the purchase price of the land, payable in eight, twelve, and twenty-four months from date, with the appellant Johnson as his surety. The report of sale was confirmed by the court. After the confirmation of the sale, and the maturity of the first and second bonds, the appellants were ruled to show cause why they should not pay these two bonds. They filed separate responses

to the rule, in which they alleged that, at the time of the sale of said land, George B. Hodge had no title whatever to said land; that therefore there was no consideration for said bonds. The circuit court, notwithstanding these responses, made the rule absolute, from which they have appealed to this court.

This court, in the case of *Farmers' Bank v. Peter*, 13 Bush, 594, held that after the confirmation of the decretal sale of a piece of real estate to satisfy a mortgage debt in favor of the Farmers' Bank, Peter, the purchaser of the real estate, was not entitled to an abatement of the purchase price of the real estate on account of a prior and superior lien thereon for taxes due the state, and city of Henderson. This court holding in that case, that, after the confirmation of a decretal sale, the doctrine of *caveat emptor* applied in all its rigor, and that the purchaser could not resist the payment of the purchase price on account of any defect in the title of the property. But it is contended that the Peter case is distinguishable from this case in this: that in that case Peter got a perfect title to the land, except that it was encumbered by a prior lien for taxes; that he, in fact, got something, which fact was sufficient to uphold the consideration; but in this case the appellant Williams got no title whatever; therefore there was a total failure of consideration for the bonds. But the court in the Peter case announced the broad doctrine that in judicial sales of real estate there is no warranty of title; that while the chancellor will not compel his vendee to pay for the land purchased at his sale, if the purchaser makes known before the sale is made complete by confirmation that he acquires no title, yet after confirmation the purchaser will not be permitted to avoid the payment of the purchase price upon the ground that he acquired no title to the land. The doctrine thus announced is in harmony with the current of authorities, and accords with reason.

Rorer on Judicial Sales, second edition, section 174, says: "The rule is, as to all judicial sales, except as regards fraud, that the maxim *caveat emptor* applies. Let the buyer beware. There is no warranty of title or quality. They are sales by the court, and there is no one to go back on if the buyer takes nothing. . . . But although sales, whether judicial or on execution, are made subject to the doctrine of *caveat emptor*, yet, if misrepresentations be made by the person selling, and be relied on by the buyer to the injury of the latter, the sale will be set aside." The rule announced in Rorer is sustained by

the current of authorities, and was clearly recognized as correct by this court in the Peter case. So it may be regarded as a settled rule of law that after a judicial sale of real estate has been made complete by a confirmation of the sale, the purchaser cannot successfully resist the payment of the purchase price on the ground that he acquired no title to the property, unless he can show that he was induced to make the purchase by the misrepresentations of the creditor, or person making the sale, as to the condition of the title, and that he did not discover, and could not have discovered with reasonable diligence, the true condition of the title until after the confirmation of the sale. The appellants did not allege either of the latter facts. They therefore cannot successfully resist the payment of their bonds.

If it be true that George B. Hodge had no title to said land, he or his estate will be liable to the appellants for the sum that they may pay on these bonds, upon the ground that they have been compelled to pay his debt without having received value therefor.

The judgment of the lower court is affirmed.

JUDICIAL SALES. — The rule of *caveat emptor* applies to judicial sales: *Lewer v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note 45; *Cotton v. Carle*, 85 Ala. 175; 7 Am. St. Rep. 29, and note 31; *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613; *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and note 102; note to *Meher v. Cole*, 7 Am. St. Rep. 105.

KOENIG v. KRAFT.

[87 KENTUCKY, 95.]

WILLS — CONSTRUCTION. — A devise by a husband to his wife of all his property, of whatever nature, possessed by him at the time of his death, to be held in trust for the sole use and benefit of herself and her child, with the power of alienation taken from her of the realty, except certain portions designated by the will, creates a life estate in the widow for the sole use and benefit of herself and the child named, remainder in fee to such child at its mother's death.

Frank Hagan and Charles G. Hulsewede, for the appellants.

M. and D. A. Sachs, and J. G. Sachs, for the appellees.

PRYOR, C. J. This case is here for the construction of the will of William Ch. Kraft, deceased. He died in January, 1866, leaving his widow surviving him, and an infant daughter, Emma, who, at his death, was four years of age. His

widow subsequently married, and had children by her second husband, and is now dead. This controversy is between the child of the deviser and the children of the same mother by her second husband. It is claimed by the appellees, the children by the second marriage, that their mother, under the will of her first husband, acquired a joint interest with the appellant, Mrs. Koenig, her only child by the first marriage, in the estate devised, and that at the mother's death, she owning a half-interest, it descended from her to all three of the children.

In a controversy between these same parties, in which the present appellant sought to cancel a deed made by her to her half brother and sister of an equal interest in some real estate devised to her by her father, under a misapprehension of her rights, this court held that the devise to the daughter was in fee, subject to a life estate in the mother, and the conveyance to her half brother and sister, upon the facts of that record, should be set aside. In the present case, the chancellor being asked to construe the will, held that the mother owned an interest equal to that of the child by her first husband and therefore the children by the second husband inherited a part of the estate from the mother, ignoring the construction placed on the will by this court, for the reason, as suggested by counsel, that it was not necessary to the decision of the question in the case heretofore in this court that the interest of the appellant or that of her mother in her father's estate should be determined.

It is plain that the extent of the interest of the mother and child in the estate under the will had an important bearing in determining the question raised in the former litigation; and as the question is again presented, we find it necessary to differ from the chancellor as to its construction.

The language of the testator's will is as follows: "I give and bequeath to my beloved wife, Elizabeth Kraft, all my real, personal, and mixed estate of which I may be possessed at the time of my demise, for her and her child, Emma Kraft's, sole use and benefit; and give my beloved wife full power and authority to sell my real estate what I now hold on Walnut, near Clay Street, but no other; and I appoint my beloved wife, Elizabeth, as executrix of this my last will and testament without security." Under this devise, if the widow takes an equal interest in fee with the infant child of the testator, that interest extends to the entire estate, as by the clause of the

will quoted he gives to his wife all of his estate, real, personal, and mixed; and if this language is not restricted in its meaning by the use of words in the same clause evidencing a contrary intention on the part of the testator, then the wife takes jointly with the child. The estate is devised to the wife, however, for a particular purpose; that is, "for her and her child Emma's, sole use and benefit," and the right of alienation withheld from his wife of all his real estate but that he hold on Walnut, near Clay Street.

The limitation of the power of the wife as to the disposition of the realty is inconsistent with a grant of the fee, and evidences a plain intent on the part of the deviser to place this property under the control of his wife, in trust for her and the child's sole use and benefit; and in the use of the property you may sell certain realty, but no other, the testator evidently contemplating that a necessity might exist for a sale of this realty,—that it might be sold or its proceeds used beneficially by the objects of his bounty. Besides, I devise this estate for the sole use and benefit of my wife and child; not for the benefit of her second husband, or those who had no claims on his bounty; and to enable them to enjoy it, the deviser placed no limitation on its use for the benefit of his wife and child, and vested in the widow the power to sell a part of the realty for that purpose. The child was then only four years of age, and the testator no doubt thought that his wife, in raising and educating it, as well as providing for her own comfort, would require the use of all his estate save the realty that he expressly said should not be sold. The use of the property thus devised was not confined to the mere income, but the whole of it might be disposed of by the wife for that purpose. The question is, What becomes of that portion of the estate unsold or undisposed of? Suppose the wife had sold none of the realty, then is it not manifest that the mother being dead the child would take the absolute estate, not from the mother, but from the father? The mother's right to the use and enjoyment having terminated, the whole passed to the child. It was in fact a life estate in the widow, for the use and benefit of herself and child, remainder in fee to the child at its mother's death. She was then the sole beneficiary, and the restriction over the power of alienation shows a manifest purpose to place the estate in trust, to be held by the wife as long as she could enjoy it in conjunction with the child, but no longer. In construing the meaning of a conveyance, in th

case of *Davis v. Hardin*, 80 Ky. 672, this court said: "When a husband makes a conveyance to his wife and their children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by the death of the wife, pass into the hands of a stranger." In that case, the conveyance was to "Thompson, in trust for the said Mary E. Jones and William P. Jones, and any other child she may have." This court held that the wife took a life estate. Here the devise is to the wife, to be held in trust for her and the child's sole use and benefit, with the power of alienation taken from the wife of his realty, except certain portions designated by the will.

Did the testator contemplate the execution of a will by which the use and profits of his estate, or the proceeds of its sale, should pass to the second husband of the wife on the marriage or at her death, or was he attempting to secure the estate for the child by placing it in trust to be held by the mother for the sole use and benefit of both so long as the mother lived? The latter construction should be given the instrument, and any other defeats the intention of the testator. In *Foster v. Shreve*, 6 Bush, 519, a deed to the mother conveying to her and her present heirs forever was held to vest in the mother an estate for life only. In *Crockett v. Crockett*, 2 Phill. 553, the testator directed that "all of his property should be at the disposal of his wife for herself and children." It was held that the wife was either a trustee of the fund, with a large discretion as to its application, or the trust was subject to her life estate. In *French v. French*, 11 Sim. 256, the testator gave certain moneys in trust for his daughter "for the use of herself and children"; it was held to be a life interest in the wife, remainder to the children. In *In re Harris*, L. R. 7 Ex. 344, the will read: "I give and bequeath all my property of whatever description to my wife for the maintenance of herself and children [naming them], and I constitute my said wife sole executrix." This was held to constitute a life estate in the wife.

While gifts and conveyances to a wife and her children under the ordinary rule would create a joint tenancy, the courts, in the construction of such instruments, executed by the husband to the wife and children, are always inclined to construe the instrument as an estate for life in the wife, remainder to the children; and where there is any language used in the instrument from which an inference of such an intention appears, the chan-

cellor will decline to follow the ordinary rule making them joint tenants. In the present case, a trust was created by the testator with enlarged powers of disposition on the part of the wife who was the trustee. She could use, not only the income, but the principal for the use and benefit of herself and child, except certain real estate that she was prohibited from selling. After placing the estate under the control of his wife, the testator specifies what real estate the wife might sell, and confers upon her the express power to do so, and then proceeds to say that she shall sell no other, showing a plain purpose to limit the estate of the wife, and a discretion as to its control and disposition after his death, for the uses to which it was to be applied.

The judgment below is reversed, and cause remanded for proceedings consistent with this opinion.

WILLS. — As to attempts by devisors to restrain alienation of realty devised by a limitation to that effect in the will, see *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358, and note 366; monographic note to *Smith v. Towers*, 9 Id. 405-408.

WILLS — CONSTRUCTION. — Devise to wife for life, and remainder over to children, with power to sell if thought advisable, gives to the wife only a life estate: *Whittemore v. Russell*, 80 Me. 297; 6 Am. St. Rep. 200; compare *Stuart v. Walker*, 72 Me. 146; 39 Am. Rep. 311; *Oyster v. Oyster*, 100 Pa. St. 538; 45 Am. Rep. 388; *Green v. Hewitt*, 97 Ill. 113; 37 Am. Rep. 102; *Patrick v. Morehead*, 85 N. C. 62; 39 Am. Rep. 684; for a case similar to the principal case, wherein the same rule applied, see the recent case of *Wilson v. Q'Connell*, 147 Mass. 17.

MARSHALL'S TRUSTEE v. RASH.

[87 KENTUCKY, 116.]

TRUSTS — LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY. — A testator cannot vest property or funds in a trustee for the use of another, so as to exempt it from liability for the debts of the latter, under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be liable for the debts of the beneficiary, the same as if he held the legal estate.

TRUSTS — LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY. — A discretion may be given to a trustee in the management and control of the trust estate, and as to the amount of profits to be paid therefrom, and the manner of paying them to the beneficiary, but the rights of the latter's creditors cannot be thereby impaired under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be liable for the debts of the *cestui que trust*, the same as if he held the legal title.

TRUSTS — LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY. — A trust estate, whether consisting of realty or personalty, may be subjected and sold, or if practicable and to the interest of the parties, the rents, interests, or profits may be subjected and applied by equity to the payment of the debts of the *cestui que trust*, under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be subject to the debts of the beneficiary, the same as if he held the legal title.

Yeaman and Lockett, for the appellant.

H. T. Turner and R. H. Cunningham, for the appellees.

LEWIS, J. The second clause of the will of J. B. Marshall is as follows: "All the rest and residue of my estate, of every description, including what is left of my tract of land after laying off said fifty acres to Mrs. Hickman, I give and bequeath, subject to the payment of all my just debts, to my two brothers, William J. Marshall and John H. Marshall, to be divided equally between them, but subject to this condition: that my brother John's part is to be held in trust for him by my brother William, who shall manage and control John's part, and pay him only such part of the proceeds and profits as in his discretion the said William may think best, the intention being to invest William with the legal title to John's part, to be held in trust as aforesaid."

It appears that after the death of the testator a division was made of the land by commissioners, and that part held by William J. Marshall in trust separated from the other. And appellees, creditors of John H. Marshall, instituted their several actions, which were consolidated to subject his interest in the land so allotted, and in all other property held in trust for him under the will. And whether the judgment for sale of the land to satisfy the debts was proper, is the question now before us.

Section 21, article 1, chapter 63, General Statutes, is as follows: "Estates of every kind held or possessed in trust shall be subject to the debts or charges of the person to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof." That provision has been the law since 1796, and often construed and applied in cases before this court. And from the various decisions on the subject, it may be regarded as settled that, —

1. As said in *Samuel and Johnson v. Ellis*, 12 B. Mon. 479,

“a testator cannot, nor can any one, according to our laws, vest property or funds in trustees for the use of another, without subjecting it to the debts of the *cestui que trust*.” For the language of the statute is so direct and explicit as to preclude entirely the belief it was intended any conditions or restrictions contained in a will or deed should operate to exempt an estate so held from the debts and charges of the person to whose use and for whose benefit it shall be held.

2. Although a discretion may be given to the trustee in the management and control of the estate, and as to the amount of profits therefrom to be paid, and in the manner of paying them to the person for whose use and benefit it is held, the rights of creditors are not thereby impaired. For such discretion is to be reasonably and in good faith exercised for the benefit of the beneficiary of the estate, and incidentally for the protection of his creditors, and is always subject to the control of a court of equity.

3. As said in *Eastland v. Jordan*, 3 Bibb, 186, when a slave held in trust was subjected and sold, “it is not the trust, but the estate itself held in trust, which is made subject to the debts of the *cestui que trust*.” And consequently the estate, whether it consist of land or personal property, may be subjected and sold, or if practicable and to the interest of the parties, the rents, interest, or profits may be subjected and applied by a court of equity to payments of debts of the *cestui que trust*.

In *Pope's Ex'r v. Elliott*, 8 B. Mon. 56, it was held that the bequest in that case was, by the terms of the will, different from a devise of property or money in trust for the use and benefit of an individual, and from a devise of specific property in trust to apply the proceeds or profits to his support; and therefore only such interest on the fund as had accumulated and was in the hands of the trustee could be subjected.

In *White v. Thomas*, 8 Bush, 661, it was held that a dwelling-house and land devised was not liable by reason of a proviso in the will that the property should be subject to alienation or sale by the *cestui que trust* or for her debts, and any attempt to do so should terminate her right to use and enjoy the property.

In *Davidson v. Kemper*, 79 Ky. 5, it was held that the beneficiaries, by reason of the peculiar provisions of the will, took no such interest or estate under it as could be made subject to their debts, or be enforced against the trustee.

It is not necessary to refer particularly to the provisions of

the wills in the three cases just cited, nor to determine whether they are allowable exceptions to the rules we have laid down here, for the circumstances of these cases are wholly different from the one now before us, and would not serve to illustrate the question we are considering. For, by the will of J. B. Marshall, the estate devised is plainly, in the meaning of the statute, to be held in trust for the use and benefit of John Marshall, and cannot be diverted from that object; but the trust may, if necessary, be enforced by a court of equity, at the instance of the beneficiary, and as a logical result the estate may be subjected to payment of his debts.

It does not appear that the debts could have all been satisfied in a reasonable time from the rents and profits, and the court did not, therefore, abuse a sound discretion in directing a sale of the land for that purpose.

Judgment affirmed.

VALIDITY OF A TRUST PROVIDING THAT THE PROPERTY THEREIN DEVISED shall go to beneficiary to the exclusion of his alienees and his creditors: See extended note to *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Lampert v. Hagdel*, 96 Mo. 439; 9 Am. St. Rep. 358, and note 366.

ADKINS v. WHALIN.

[87 KENTUCKY, 152.]

CHAMPERTY — CONVEYANCE OF LAND HELD ADVERSELY. — Where two or more joint tenants convey their interest in land to a stranger, who conveys the whole tract to another stranger, who goes into possession, after which another of the joint tenants, who was not a party to the first conveyance, conveys his interest in the land to a third party, the stranger in possession holds adversely to the tenant last conveying, so that his vendee gets no title; and the conveyance is void, as champertous, under section 2, chapter 11, General Statutes of Kentucky, prohibiting the sale of land, adversely held, to a stranger to the title.

William Wand, for the appellants.

James and Helm, and Edward W. Hines, for the appellee.

BENNETT, J. The appellant V. A. Borah, as one of the children, and as administrator of George M. Borah, deceased, filed his petition in the Butler circuit court for the purpose of settling the estate of said deceased, and having his land sold to pay his indebtedness. One hundred and fifty acres of a tract of three hundred acres of land belonging to said deceased was sold for said purpose. The widow and children, except the

appellant Borah, of the deceased, remained in the possession of the remaining portion of said tract. The appellant Borah, having wasted some of the assets of his decedent's estate, he, in 1856, and after the sale of said 150 acres of land, moved to the state of Wisconsin, where he has remained ever since. In 1869, all of the children then living of George M. Borah, except the appellant V. A. Borah, conveyed, with the consent of their mother, by title bond, all their interest in the remaining 150 acres of land to their brothers, C. C. and G. F. Borah. Afterwards, G. F. Borah sold his half of said land to C. C. Borah. Afterwards, to wit, on the fifteenth day of October, 1873, C. C. Borah, together with the other children of George M. Borah, then living, except the appellant Borah, conveyed, by deed, seven eighths of said land to G. H. Borah (not one of the heirs). He, in 1873, conveyed by deed the whole of the 150 acres of land to the appellee, J. H. Whalin. He immediately took the actual adverse possession of the whole tract of land, claiming it as his own. In 1874, while the appellee was in the actual possession of the tract of land, claiming the whole of it adversely to all the world, the appellant Borah conveyed by deed one eighth of it to the appellant Adkins.

In 1885, the appellants, Borah and Adkins, filed their joint petition in the Butler circuit court against the appellee, for the purpose of having the said tract of land divided in the proportion of one seventh to the appellant Adkins, and six sevenths to the appellee.

They alleged in their petition that the appellant Borah, in fact, sold to the appellant Adkins one seventh of said land, but by mistake the deed called for one eighth only. Among other defenses, the appellee relied on that of champerty. If this defense is available, it is unnecessary to notice the others.

The appellants contend that, as the appellant Borah and his brothers and sisters held the land in joint tenancy, the sale by the brothers and sisters of their interest to a stranger, and his sale of the whole tract to another stranger, could not invest the latter with such an adverse possession of V. A. Borah's interest in the land as to defeat his vendee's right to maintain an action to have the land divided, and the interest of V. A. Borah restored to his vendee.

This court, in the case of *Russell v. Doyle*, 84 Ky. 386, decided that a sale by one tenant in common to his co-tenant of his undivided interest in land, which was held adversely, was not champertous; for the reason that each joint tenant or ten-

ant in common owns an interest in the entire tract of land, and the sale by the one of his interest to the other introduces no stranger to the title, but simply increases his interest in the whole. But the case at bar is not like that case. For the brothers and sisters of V. A. Borah sold their interest in said land to a stranger to the title, and he sold the whole land, including V. A. Borah's interest, to another stranger to the title; and the latter, pursuant to said purchase, entered upon the land in his own right, and was holding the actual adverse possession of the whole tract at the time the appellant V. A. Borah sold his interest to the appellant Adkins, who was also a stranger to the title.

The policy of the statute against champerty is to prevent litigation by prohibiting the sale of land adversely held to a stranger to the title. Tested by this rule, the appellant Adkins, having as a stranger to the title purchased V. A. Borah's interest in the land while the appellee was in the adverse possession of it, he having also purchased as a stranger to the title, the appellant's purchase was clearly champertous, and therefore void.

But it is contended that as V. A. Borah's deed conveyed to the appellant Adkins only one-eighth interest in said land, and as V. A. Borah owned one-seventh interest therein, the difference should have been allotted to him. It is a sufficient answer to this proposition to say that the appellants, Adkins and Borah, allege in their petition that Borah, in fact, sold to Adkins one-seventh interest in said land, and that the recital in the deed should have been one-seventh instead of one-eighth interest, and they ask that one-seventh interest be allotted to Adkins. As the court, therefore, was called upon to correct the deed, and to effectuate a champertous sale of Borah's entire interest in the land, the dismissal of the appellant's petition as to Borah's entire interest was proper.

The judgment of the lower court is affirmed.

CHAMPERTY — LAW OF, WHEN AND WHEN NOT APPLICABLE: *Greer v. Winterson*, 85 Ky. 516; 7 Am. St. Rep. 613, and cases collected in note 612; *Stanton v. Haskin*, 1 McAr. 558; 29 Am. Rep. 612. The law of champerty does not apply to a sale by one tenant in common to his co-tenant of his undivided interest in realty which is held adversely, because the reason for the statute prohibiting the sale of lands held adversely ceases in such a case, and hence the law cannot apply: *Russell v. Doyle*, 84 Ky. 386. Where one has conveyed property adversely held, he cannot, without rescinding the contract, be heard to allege that it was champertous: *Lucas v. Wilson*, 85 Id. 503.

DOWNING v. MASON COUNTY.

[87 KENTUCKY, 202.]

COUNTY — LIABILITY OF FOR OBSTRUCTING A WATERCOURSE. — A county is not liable for flooding the premises of a citizen, caused by the obstruction of the course of a stream by county officers, in the proper discharge of their duties in the course of the county's employment.

COUNTY — LIABILITY OF FOR TORT. — Counties are not liable to a private action at the suit of a party injured by a neglect of the county's officers to perform a corporate duty, unless such right of action is given by statute.

Cochran and Son, and T. C. Campbell, for the appellant.

L. W. Robertson and E. Whitaker, for the appellee.

HOLT, J. The appellant avers that the appellee "unlawfully, carelessly, and negligently," so changed and obstructed the course of a stream as to flood his premises.

A county can necessarily act only through its agents. If liable at all for a tort, it can only be when committed by its agents engaged in the course of its business.

It is inferable from the petition that the act complained of was done by them in the erection of a county jail. Assuming this to be so, or that it was done at least in the course of the county's employment, and within the scope of its business proper, we reach the question involved, to wit, Is a county responsible for a tort?

Formerly it was held, as to corporations proper, that as they were not created to commit wrongs, therefore it was *ultra vires*, and they could not do so. This has long ceased to be the rule, however. In *Railroad Co. v. Quigley*, 21 How. 202, the supreme court of the United States decided, as to corporations proper, that they were liable for acts done by their agents, whether *in contractu* or *in delicto*, in the course of their business and employment. To the same effect is the case of *Salt Lake City v. Hollister*, 118 U. S. 256; and this is now the well-settled rule.

Counties, however, are subordinate political divisions. They do not possess corporate powers under special charters, but exist by virtue of the general laws of the state, apportioning its territory into political divisions for the conveniences of government.

They are a part of the machinery of the government. They are created for public purposes. Public duties are imposed upon those residing within their limits without request from

them; and in order that they may properly perform them, they are clothed with certain corporate powers. They are, therefore, often called *quasi* corporations. A difference should manifestly be drawn between them—invested as they are with powers and duties without their consent—and corporations proper that obtain special privileges for the peculiar benefit of their corporators. The state may compel the citizen to the performance of his county corporate duties by means of penalties, but he does not stand in the light of a person who has, for a consideration, voluntarily assumed obligations so as to owe a duty and be answerable to every one interested in its performance. In the case of municipal and ordinary corporations it is otherwise, because they accept special charters, and presumably obtain valuable privileges. Their creation is due to local advantage and convenience or individual benefit; while the leading object in establishing a county is to effectuate the political and civil organization of the state as to its general purposes and policy. It is an arm of the state, giving local effect to them. It looks largely to the administration of justice; the maintenance of the highways and bridges; the support of education, and kindred governmental objects. It is created at the will of the sovereign, without special regard to the consent or will of those residing in it. It is a necessary instrumentality in carrying out the policy of the state and in governing its people. It is governmental in its purpose and nature. It is not in the strict legal sense a municipal corporation like a city. As a *quasi* corporation it is distinguishable both from a private corporation and a municipal corporation proper. A city is liable to an individual in certain cases for a failure to discharge its corporate duties upon the ground that its powers have been granted at the special solicitation and for the benefit of its citizens, and not so much to aid in the administration of the state government as for local advantage and convenience. Further illustration by way of distinction is unnecessary.

A county being but an arm or branch of the state government, it is no more liable to be sued for the neglect or tort of its officers than the state is for that of those in authority in it. The common law gives no such right, and it, therefore, can only exist by statute. There is none in this state. •

Judge Cooley says: "It is settled that these [*quasi*] corporations are not liable to a private action at the suit of a party injured by a neglect of its officers to perform a corporate duty,

unless such action is given by statute. The doctrine has been frequently applied where suits have been brought against towns, or the highway officers of towns, to recover for damages sustained in consequence of defects in the public ways. The common law gives no such action, and it is therefore not sustainable at all, unless given by statute": Cooley on Constitutional Limitations, *247.

In the case of *Brabham v. Supervisors of Hinds County*, 54 Miss. 363, 28 Am. Rep. 352, it was held that a county is not liable for an injury arising from its neglect to repair a county bridge.

In *Kincaid v. Hardin*, 53 Iowa, 430, 36 Am. Rep. 236, it was decided that a county is not responsible for an injury sustained by reason of the defective construction and imperfect lighting of a court-house.

In *Dosdall v. County of Olmsted*, 30 Minn. 96, 44 Am. Rep. 185, it was declared that one cannot sue a county for an injury due to the negligence of its officers in failing to repair a sidewalk appurtenant to the court-house.

In *Wehn v. Commissioners of Gage County*, 5 Neb. 494, 25 Am. Rep. 497, it is said that a county is not liable to a citizen for the erection of a jail in the immediate vicinity of his residence, nor for suffering it through filth and disorder to become a nuisance.

Many cases could be cited to the same effect. Among them are *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 110; *Bigelow v. Randolph*, 14 Gray, 541; and *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302.

The same reason exists for denying the citizen the right to sue a county for a wrong, whether it arises from its action or mere non-action; whether from mere neglect or a positive act. If permissible in one instance, it would be in the other; and even if in either, it would lead to innumerable suits, and open a wide avenue for trouble and obstruction to the state government. This is illustrated by the cases above cited. The denial of the right may sometimes, and no doubt often does, result in individual hardship; but public policy demands it. It must be kept in view that the paramount object of the existence of a county is governmental; that it is, indeed, a part of the sovereignty itself. In view of this, and for its proper conduct, it has become a settled judicial rule, that no liability exists upon its part, unless it be authorized expressly or by necessary implication by statute. Its general purpose forbids that

it should otherwise be open to suit, or answerable for the manner in which it either exercises, or fails to exercise, its corporate powers.

Judgment affirmed.

MUNICIPAL CORPORATIONS. — Liability for damages resulting from overflow of waters caused by making improvements or changing street grades: See *Davis v. City of Crawfordville*, 119 Ind. 1; *ante*, p. 361, and note.

MUNICIPAL CORPORATIONS — ACTIONS AGAINST FOR NEGLIGENCE AS TO DUTIES. — At common law no action lies against a municipality for damages caused by a defective highway: *Mower v. Leicester*, 9 Mass. 247; 6 Am. Dec. 63; *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and cases cited in note 35. Because the liability of a municipality to keep its roads in repair is statutory: *Raymond v. City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57. Compare *Chope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 112, and note.

SUTTON v. SUTTON.

[87 KENTUCKY, 216.]

ESTATES OF DECEDENTS — BASTARD'S RIGHT OF INHERITANCE. — The legitimate children of a bastard may inherit from the bastard brother of their parent, who dies after the death of such parent, under section 5, chapter 31, General Statutes of Kentucky, providing that bastards of the same mother are capable of inheriting and transmitting an inheritance on the part of each other, as if born in lawful wedlock of the same parents.

SUET by the legitimate children of W. S. and S. and G. Sutton for a division of the estate of K. Sutton, deceased, all of whom, together with M. Sutton and Mrs. S. Overfield, were bastards of the same mother. M. Sutton and Mrs. Overfield were the only survivors of K. Sutton, and they prosecute this appeal from a judgment in favor of the legitimate children first mentioned.

John Young Brown, Thomas E. Ward, and Edward W. Hines, for the appellants.

Yeaman and Lockett, and S. B. and R. D. Vance, for the appellees.

HOLT, J. This appeal presents but one question: Can the legitimate children of a bastard inherit from the bastard brother of their parent, who dies after the death of such parent?

At the common law a bastard is *nullius filius*. Blackstone says that he is of kin to no one, derives no inheritable blood

from any one, and can therefore neither be heir to any one, or have heirs, save of his own body. It was provided, however, by our statute of descents in 1796: "Bastards, also, shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother": 1 M. & B. 565. This was the first innovation upon the common-law rule in this state. It was copied *verbatim* from the Virginia statute of 1785; and in the case of *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207, where bastards claimed to inherit from a legitimate brother, the supreme court of the United States construed it as meaning only that bastards "shall have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate."

This court considered it in 1834, in the case of *Scroggin v. Allen*, 2 Dana, 363. Henry Edgar, a bastard, died, leaving a legitimate child, to whom his land descended, but who died in infancy. The mother of the bastard was also dead; and the question was, whether his legitimate brothers and sisters or his wife took the estate. This court followed the supreme court, holding that the statute only permitted the bastard to inherit from the mother, and transmit an inheritance to his own issue; and while to this extent *quasi* legitimate, yet in all other respects he was a bastard, the mother being unable to take from him, and he being, in law, without father, brothers, or sisters. Thus the law remained until 1840, when another change was made. The act then passed provides "that the mother shall be, and is hereby, rendered capable to inherit and take by descent or distribution, as heir or distributee of her bastard child; and brothers and sisters of the same mother, born out of wedlock, shall be capable to inherit, and take by descent or distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood": Loughborough's Digest, 211.

In *Remington v. Lewis*, 8 B. Mon. 606, it was said that the statute, as thus amended, permitted the mother to inherit from her illegitimate child, and her illegitimate children from each other; but the question there was, whether the legitimate brother of the bastard, or the latter's wife, should take; and it was held that it did not operate to establish a right either in the illegitimate children to inherit from the legitimate, or in the legitimate to take from the illegitimate. The bastard,

under this construction, has, under the law of descent, no brothers or sisters, save the illegitimate children of the same mother.

The acts of 1796 and 1840 were, in substance, incorporated into the Revised Statutes of 1852, and also into the present General Statutes (1873). The provision is the same *verbatim* in each, and reads thus: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

It was said in *Allen v. Ramsey's Heirs*, 1 Met. 635, that this statute embraces all the provisions of both the act of 1796 and that of 1840, so far as they relate to bastards; but the question in this case was, whether a bastard (his mother being dead) could take as the heir of the mother's brother; and the claim was rejected.

In *Berry v. Owens's Heirs*, 5 Bush, 452, O. survived his sister, and her only child, an illegitimate daughter. It was decided that B., the son of the illegitimate daughter, could not inherit from O., who died intestate, and without descendants. The record in this case was an imperfect one; and doubtless owing to this fact, some portions of the opinion are not only wanting in that clearness of statement for which the writer was justly distinguished, but go beyond the question presented. It is evident, however, that the case now presented is unlike it.

In *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246, it was held that a bastard cannot inherit through his mother from her ancestors or collaterals.

We have briefly noticed the above cases by way of calling attention to the fact that they are unlike the one now before us. In the most of them, the right of a bastard to inherit was in issue. Here the legitimate heirs of parents, who, if alive, would take, are asserting a right to the inheritance. We must not confound the law applicable to bastards with that applicable to the legitimate children of a bastard. If the appellees in this case were bastards, undoubtedly they could not inherit from the brother of their deceased parents; but being legitimate, why do they not succeed to all the inheritable rights of their parents? The latter and the intestate were all bastards by the same mother. This being so, they could, by the express language of the statute, inherit from each other. It

says: "Bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

It is urged that the bastardy of the parents stopped the current of inheritable blood. While this is true at common law, yet the statute has declared that it shall flow on as between bastards by the same mother, and that they shall inherit from each other. It legitimates bastard children by the same mother, —1. As to their mother; and 2. As to each other. It puts them upon the footing of legitimate brothers and sisters as to each other; and the statute of descent applicable to legitimate brothers and sisters, therefore, applies as between them and to their legitimate descendants. It follows from this, in our opinion, that the legitimate child of a deceased bastard may inherit from the bastard's mother, and that such a child succeeds to the parent's right of inheritance from a bastard brother or sister. The legitimate child of a bastard has all the rights of any child as to the parent, and the bastard parent can transmit to his or her legitimate child all the rights he or she has equally with any other parent. Among them is the right to inherit from a bastard brother or a bastard sister; and if they are brothers and sisters in contemplation of law, it follows logically that the legitimate child of a deceased one should succeed to the inheritance that would have belonged to the parent were he or she alive. This is equitable.

It is contended that the statute is in derogation of the common law; that it should, therefore, be construed strictly; and that while it permits bastards by the same mother to inherit and transmit an inheritance "on the part of each other," that yet the legitimate children of one of them cannot take what the parent would have inherited if alive, because the statute does not expressly say so. Section 16, chapter 21, of the General Statutes, however, provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary, its provisions are to be liberally construed with a view to promote its objects."

To say that the legitimate offspring of a bastard shall not take what he would have inherited, if alive, would not only be unjust, but unreasonable. If, as we think, the effect of the statute be to make bastard children by the same mother legal brothers and sisters as to inheritance from each other, then it

follows that not only the spirit, but even the letter, of our statute of descents gives to the legitimate children of one of them, *per stirpes*, the portion the parent, but for his or her death, would have inherited.

Judgment affirmed.

BASTARDY — INHERITANCE. — For rules as to the rights of bastards to inherit, see extended note to *Simmons v. Bull*, 56 Am. Dec. 261-266; *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 553; *Jackson v. Jackson*, 78 Ky. 390; 39 Am. Rep. 246; and the note to *In re Ingram*, *ante*, pp. 81-112.

KENTUCKY CENTRAL R'y Co. v. ACKLEY.

[87 KENTUCKY, 278.]

MASTER AND SERVANT — FELLOW-SERVANTS — RAILROADS. — Damages for personal injuries resulting from the collision of a passenger train with a freight train may be recovered by the engineer of the passenger train from the railroad company, upon proof that the injury was caused by the negligence of those in charge of the freight train, in not running the latter on time.

MEASURE OF DAMAGES — NEGLIGENCE. — Where plaintiff, in a personal action for injury resulting from negligence, in the presence of the jury disclaims any claim for expenses for medical attendance, or loss of time, an instruction that if the jury find for plaintiff they may assess for plaintiff such damages as he has sustained, is not subject to objection by defendant on the ground that it does not point out the criterion by which the jury must be governed in fixing the amount of compensatory damages, nor does such instruction authorize the finding of punitive damages.

L. T. Applegate and George C. Lockhart, for the appellant.

Cowan and Ferris, John H. Fryer, and J. W. Peck, for the appellee.

LEWIS, J. Appellee brought this action to recover damages for personal injuries resulting from a collision of a passenger train of cars, — upon which he was acting as engineer, — with a freight train, both being at the time operated upon appellant's road.

The collision, which it is in the petition alleged was caused by the willful negligence of appellant and its servants, occurred a short distance south of the end of the side-track at Cataba station, but at a curve in the road where those in charge of the respective trains could not perceive the danger in time to prevent it. It appears from the evidence the passenger train was at the time going from Covington south, and

was due at Cataba 9:10, P. M., and at Falmouth 9:18, P. M. There is a slight difference in the testimony of the engineer and the local agent at Falmouth in regard to the precise time the freight train left that station bound north, but we think it is satisfactorily shown it did not leave soon enough, going the allowable rate of speed, to arrive at Cataba and get upon the side-track ten minutes, — the time prescribed by the rules of the company, — or any length of time, before the passenger train was due there. And as the latter train was as near on time as is generally practicable, and was entitled to the track, it is evident the collision was caused by those in charge of the freight train, which was four or five hours behind time, leaving Falmouth when a collision would be probable if not inevitable. We therefore think there was evidence tending to show, if not clearly showing, the injury to appellee was caused by the willful neglect of not only the engineer but conductor of the freight train, who had the power to direct its movements, and ordered or improperly permitted the departure from Falmouth, and the lower court did not err in overruling the motion of the defendant for a peremptory instruction to the jury, if the maxim *respondeat superior* be applicable to a case like this; and that it should be thus applied has been settled by this court in *Louisville, C., & L. R. R. Co. v. Cavens's Adm'r*, 9 Bush, 559.

In that case, the action was instituted by the personal representative of an engineer, whose life was destroyed by reason of a collision of the train he was on with another freight train. The two trains were not in that case, as in this, moving in an opposite direction, but the one upon which the decedent was acting as engineer was in rear of and ran into the other that was at the time, and had been for a half an hour or more, stationary at the foot of an up-grade, or vainly trying to ascend it. But notwithstanding the evidence showed the train-dispatcher was also negligent, yet the question of the liability of the company for the negligence of the conductor of the train in front in failing to give any signal or warning, by which those on the coming train might have been advised of the danger of a collision, was directly considered and determined in the affirmative. It was argued in that case that the rule should be applied that when a number of persons contract to perform service for another, the employees not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be

had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service with reference to his co-laborer as precludes him having any control over his actions or right to advise even as to the manner in which the service is to be performed; and the court used this language: "If Cavens, the person killed, had been on the same train with Armstrong, the negligent conductor, and in a condition, by reason of his equality with him as an employee, to watch over and provide against his negligence, the reasons, then, for refusing to make the company liable would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist, and in such case, those controlling and directing the movement of one train, with reference to those upon another train, must be regarded as the agents of the company." It is useless to add to what was said in that case, because the rule there adopted is clearly applicable in this, and is reasonable and just.

The next and only other question made in argument for appellant arises on instruction No. 1, given at the instance of appellee, as follows: "If the jury believe, from all the evidence, that the plaintiff was in the employment of the defendant as engineer of passenger train No. 6, known as the fast line on said defendant's road, and was so in charge of said train on the evening of the first day of December, 1882, and that said train collided with local freight train No. 13, belonging to said defendant on the said road, near Cataba station, on said road, and that thereby said plaintiff received injuries on his head, shoulders, hip, and spine, or either, and that from said injuries he was temporarily or permanently disabled from labor at his business in whole or in part, and that said injuries were the result of the willful negligence of defendant's employees in control of said freight train No. 13, at said time, they shall find for the plaintiff such damages as he sustained, not exceeding the amount claimed in the petition, unless they shall further believe, from the evidence, that said plaintiff contributed by his own negligence to bring about said collision and injuries, and but for said plaintiff's negligence he would have escaped the injuries, in which latter case they should find for the defendant." The objections made by counsel to that instruction are, that it authorized the jury

to give compensatory damages, without being informed by the court of the criteria by which it was their duty to be governed in fixing the amount; and in directing them, in case they believed the injury was the result of willful neglect, to find punitive damages, instead of leaving such finding to their discretion.

Compensatory damages for personal injuries, where death does not ensue, as held by this court, is confined to the expense of cure, value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money: *Louisville etc. R. R. Co. v. Cavens's Adm'r*, 9 Bush, 728; *Muldraugh's Hill C. & C. T. Co. v. Maupin*, 79 Ky. 101.

Neither the expense of cure, value of time lost, nor mental and physical suffering, are referred to in the instruction as elements of damages sustained by the plaintiff, and to be assessed by the jury; but the language used by the court restricted their inquiry to the extent of his disability to labor at his business, that is, reduction of his power to earn money.

It appears that during the examination of the plaintiff as a witness he was asked if the defendant did not pay his physician's bills, and also pay for his lost time; whereupon the attorneys for the plaintiff announced he made no claim for expenses on account of medical attention or loss of time. We must therefore presume the lower court, as was its duty, purposely omitted to mention in the instruction either of those two elements of damages, and that the jury having heard the disclaimer, did not, in the absence of an instruction to that effect, take them into consideration in assessing the amount. As the jury had the right, and it was their duty, to consider the mental and physical suffering of the plaintiff caused by the injury, the failure of the court to instruct them to do so was certainly not prejudicial to the defendant.

We do not think the jury could have regarded themselves authorized by the instruction to find punitive damages. The language is, "they shall find for the plaintiff such damages as he sustained," which is entirely distinct from the idea of exemplary or punitive damages, that might have been given to or found for, but could not in any sense have been sustained by, him.

There is some contrariety in the testimony as to the character and extent of the injury done to the plaintiff. But there was evidence before the jury conducing to show his sufferings

were great, and the injury of a serious and permanent nature. And we are not, therefore, authorized to say the verdict was the result of passion or prejudice, or that the amount of damages fixed is so excessive, compared with like cases heretofore passed on by this court, as to justify a reversal.

Judgment affirmed.

MASTER AND SERVANT — FELLOW-SERVANTS, WHO ARE, AND WHO ARE NOT: See Lawson's Rights and Remedies, secs. 319, 320; *Richmond etc. R'y Co. v. Normont*, 84 Va. 167; 10 Am. St. Rep. 827. and cases collected in note 835.

MASTER AND SERVANT. — The master is liable for injuries to one servant caused by the negligence of another servant, when the two are not co-servants: *Stephens v. Hannibal etc. R'y Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note 342, 343; *Baldwin v. St. Louis etc. R'y Co.*, 75 Iowa, 297; 9 Am. St. Rep. 479, and note 483; *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311, and note 328; compare *Sullivan v. Tioga R'y Co.*, 112 N. Y. 643, 8 Am. St. Rep. 793, as to negligence of the servant of one company causing injury to the servant of another company, when both companies are using the same railway track; *Hussey v. Coger*, 112 N. Y. 614; 8 Am. St. Rep. 787.

HUTCHCRAFT'S EX'R v. TRAVELERS' INS. CO.

[87 KENTUCKY, 300.]

INSURANCE. — ACCIDENTS ARE OF TWO KINDS: 1. Those that befall a person without any human agency; 2. Those that are the result of human agency. The latter may be classified as, — 1. Those which happen to a person by his own agency; and 2. Those which befall a person by the agency of another person, without the concurrence of the latter's will; 3. Those which a person intentionally does, whereby another is unintentionally injured; 4. When one person intentionally injures another, not in a rencounter, or as the result of the misconduct of the person injured, nor foreseen by him.

INSURANCE — ACCIDENT. — DEATH BY BEING WAYLAID AND ASSASSINATED authorizes a recovery under a policy insuring the person so killed against death "through external, violent, or accidental means."

LIFE INSURANCE — CONDITION AGAINST INTENTIONAL INJURIES INFLICTED BY OTHERS. — A condition in a life insurance policy, that no claim shall be made under the policy when death or injury is caused by intentional injuries inflicted by the assured or any other person, bars a recovery where the assured is waylaid and assassinated for the purpose of robbery.

William Lindsay and Russell Mann, for the appellant.

James S. Pirtle, for the appellee.

BENNETT, J. During the time that the appellant's testator held two tickets of insurance in the appellee's company, insuring his life, in the sum of three thousand dollars each, against

death "through external, violent, or accidental means," he was waylaid and assassinated for the purpose of robbery. The appellee interposed two defenses to the appellant's action to recover these sums: 1. That the appellant's testator, having been killed by intentional "means," his death was not accidental within the meaning of the terms of the policy which insured him against death "through external, violent, and accidental means"; 2. That the proviso in the policy expressly exempted the appellee from liability in case the appellant's testator come to his death through injuries intentionally inflicted by another person. These defenses will be disposed of in their order.

1. In each ticket the appellee covenanted to pay three thousand dollars to Hutchcraft's representatives, if he should be killed "through external, violent, and accidental means."

Accidents are of two kinds,—1. Those that befall a person without any human agency, as the killing of a person by lightning; here the elementary properties of lightning and its flash are not caused or controlled by human agency; but the fact that the person was struck by unintentionally placing himself within its range is, as to him, accident; 2. Those that are the result of human agency. The latter are divided as follows: 1. That which happens to a person by his own agency; as if he is walking or running and accidentally falls and hurts himself; here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was therefore accidental; 2. That which befalls a person by the agency of another person, without the concurrence of the latter's will; as where one, standing on a scaffold, unintentionally lets a brick fall from his hand, and it strikes a person below; here the dropping of the brick, as it was not intended by the former and was unforeseen by the latter, is, in the broadest sense, an accident; 3. That which a person intentionally does, whereby another is unintentionally injured; as where one intentionally fires a gun in the air and accidentally shoots another person; here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but as to the person shot, it was by purely accidental means; 4. So also, as we think, if one person intentionally injures another, which

was not the result of a rencounter, or the misconduct of the latter, but was unforeseen by him; such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is, as to him, accidental, although inflicted intentionally by the other party. It is conceded that in the three instances first named, the injury would be by "accidental means." And, doubtless, it will not be denied that if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whoever might be on board, whereby one or more persons were shot or mashed, that the casualty befalling these persons, as far as they were concerned, would fall within the term of "accidental means." In other words, we do not regard it as essential, in order to make out a case of injury by "accidental means," so far as the injured party is concerned, that the party injuring him should not have meant to do so; for if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen,—a casualty,—it seems clear that the fact that the deed was willfully directed against him would not militate against the proposition that, as to him, the injury was brought on by "accidental means."

2. That part of the proviso that is germane to the second ground of defense is as follows: "And no claim shall be made under this ticket, when the death or injury may have been caused by dueling, fighting, wrestling, lifting, or over-exertion, or by suicide (felonious or otherwise, sane or insane), or by intentional injuries inflicted by the insured or any other person."

The fact that the insured engaged in a duel or fight, though forced upon him; the fact that he engaged in a wrestling match, however innocent; the fact that he engaged in lifting, though never so cautious; the fact that he over-exerted himself, though never so innocent of an intention of doing so, whereby he received injuries,—are expressly excluded from the operation of the policy. Also, the fact that the insured commits suicide, although insane,—therefore, in a legal sense, accidental,—excludes him from the benefit of the policy. The remaining clause stipulates for a further exemption of the appellee's liability, in the event that intentional injuries are inflicted upon the insured by himself, or any other person. It

is contended by the appellant that the meaning of this clause is, that "if the injured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him with his consent, or at his instance, then the appellee should not be liable." A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedent, reads as follows: "No claim shall be made under this ticket when the death may have been caused by intentional injuries inflicted by the insured or any other person." The sentence, though awkwardly expressed, is complete, and clearly expresses the idea that if the insured intentionally injures himself by the infliction of bodily wounds from which he dies, he thereby breaks the condition of the policy; or that if he is intentionally injured by any other person by the infliction of bodily wounds from which he dies, the condition of the policy is thereby broken; therefore, to add the words, "with his consent, or at his instance," would have the effect of torturing the meaning of the language used beyond its legitimate import.

By the terms of the contract, the company undertakes to indemnify against death or injury effected "through external, violent, and accidental means."

By virtue of this undertaking, the company would be liable, if the death or injury should be effected by any external and violent means whatever, that was, as to the insured, accidental, except in so far as the company, by the proviso, limited its liability; for it is a well-known rule of construction that where the undertaking of a party is expressed in general terms, as in this case, and specified things, as in this case, are excepted from the operation of the general terms, such terms are to be construed as covering all things coming within their scope, except those that are expressly excluded. As, therefore, the assassination of Hutchcraft was as to him an unforeseen event,—a casualty,—his taking off was through external, violent, and accidental means; but we also think the clause of the proviso that excludes the appellee's liability in case death or injury is intentionally inflicted by any other person, applies to this case. We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the injured may receive at the hands of third persons who are attempting to do mischief generally, or who are attempting to injure any particular individual other than the insured, or

class of individuals, or any kind of property; for in such cases it cannot be said that the injuring was intentionally aimed directly and individually at the insured.

The judgment of the circuit court overruling the demurrer to the appellee's answer is affirmed.

ACCIDENT INSURANCE. — As to what circumstances occasioning the death of the assured will, and what will not, work a forfeiture of the policy, see *Streeter v. Western Ins. Co.*, 65 Mich. 199; 8 Am. St. Rep. 882, and note 885, 886; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913, and note 924; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; *ante*, p. 270, and extended note. In *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913, a recovery was sustained, although the assured was shot and instantly killed by a deputy sheriff.

SAVINGS BANK OF LOUISVILLE'S ASSIGNEE v. CAPERTON. MYERS v. CAPERTON.

[87 KENTUCKY, 306.]

BANKS AND BANKING—LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER. — The directors of a bank who receive no compensation for their services are not personally liable for the defalcations of their fellow-director whom they have chosen as cashier, teller, and book-keeper of the bank, with no reason to suspect his fidelity to its interests, and whose past life as a business man, so far as known, was a guaranty of his honesty and capacity, and whose experience in banking, personal and financial character for integrity, commended him to all business men as well qualified for the position.

BANKS AND BANKING—LIABILITY OF DIRECTORS FOR DEFALCATIONS OF THEIR CASHIER. — The directors of a bank who serve without compensation are not liable personally for the defalcation of the person chosen as cashier, teller, and book-keeper, in the absence of any reason for suspecting his honesty, or any gross neglect on their part, and when they have exercised such reasonable diligence and ordinary care with reference to the affairs of the bank as ordinarily prudent men would exercise in reference to such business affairs.

BANKS AND BANKING—DUTY OF DIRECTORS AS TO CASHIER. — A bank director who serves without compensation is neither required to be an expert or a competent book-keeper, nor to do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity, that his daily, weekly, or monthly statements correspond with the general balance upon the books of the bank. If this is done, and an adequate bond required of such cashier for the faithful discharge of his duties, the director is not personally liable for his defalcation.

BANKS AND BANKING—DUTY OF DIRECTORS—BURDEN OF PROOF. — In an action against the directors of a bank to make them personally liable for the misappropriation of funds by the cashier, the burden of proof is on the plaintiff to show a want of diligence on the part of the directors in discovering or preventing the defalcation.

BANKS AND BANKING — LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER. — Where directors of a bank place certain bonds belonging to their bank in another bank to enable the former to draw upon the latter, and the cashier of the former bank pledges the bonds as collateral to raise money which he converts to his own use, the directors are not guilty of neglect, nor liable personally, for the defalcation of the cashier, in the absence of reason to suspect his fidelity and honesty to the bank.

BANKS AND BANKING — LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER. — Where the cashier of a bank in his statement as to its condition uses the bonds of one of the directors as assets in his absence, this does not indicate negligence or want of diligence in the bank directors in not examining the bank-books to ascertain to whom the bonds were charged, especially when the bank is accustomed to invest in like bonds, and the directors had no reason to suspect the integrity of the cashier.

Rozel Weissinger and Alexander P. Humphrey, for the assignee.

B. F. Buckner, for Myers.

James Speed, A. Barnett, and Thomas and John Speed, for the appellees.

PRYOR, C. J. This action was instituted by Gustave Myers and others against the president and directors of the Louisville Savings Bank, to recover the various sums due to them as depositors in its savings department, the loss having been caused from the embezzlement of the funds of the bank by J. H. Rhorer, the cashier. The ground of recovery is the alleged negligence of the directors in the general conduct of the bank, and particularly in their failure to inspect the books of the bank, and a want of diligence in supervising the acts of their subordinate, the cashier.

The bank by reason of the defalcation was rendered insolvent, and an assignment made in January, 1880, of all of its assets to the appellant Jones. The creditors of the bank filed their petition in equity, alleging that Jones, the assignee, refused to sue the directors, or to unite with them in the action.

Jones was made a defendant to the action, and by a cross-petition sought to recover of the directors for the default of Rhorer, on account of their negligence with reference to the affairs of the bank, alleging that he had delayed the litigation for the purpose of ascertaining the condition of the bank, and the facts, if any, upon which a recovery could be had against the directors.

A controversy originated in the court below as to the right

of Jones to maintain this cross-action, and on motion of the creditors they were alone allowed to prosecute the cause of action set up in the original petition, and the claim of the assignee, in so far as it affected the depositors, was dismissed.

It is not necessary, in the light of the facts presented, to discuss the right of either Jones or the creditors to maintain the action further than to say that the bank or its assignee is the proper party plaintiff in such cases, unless it plainly appears that a cause of action exists and the bank refuses to bring the action. We will proceed, therefore, to consider this case on its merits.

The corporation, the Louisville Savings Bank, was organized in the year 1866, and was the successor of a bank called the Louisville Savings Institution, the former having been merged in the latter by taking all of its assets and assuming all of its liabilities. An election of directors was held in August, 1866, and James Guthrie, Joshua F. Speed, James W. Henning, Milton H. Rhorer, and Jonas H. Rhorer were selected. The directors then elected J. H. Rhorer, the subsequent defaulting cashier, president, and Thomas Barclay cashier; and when this was done, directed the president and other officials to have the balances on the books of the old bank transferred to the books of the new bank. Guthrie died in April, 1869, and John Caperton was made director in his stead. In 1871, J. H. Rhorer resigned as president, and was made cashier, Barclay having ceased his connection with the bank. Caperton was then elected president. In 1874, M. H. Rhorer resigned as director, and Andrew Sabine placed in his stead.

From the 1st of January, 1871, J. H. Rhorer filled the place of cashier, teller, and book-keeper in the commercial or general department of the bank. The bank had two departments in the same building, one known as the savings department and the other as the general or commercial department, both regarded, however, as the one bank, and money often transferred from one department to the other.

The directors sought to be made liable are Caperton, Henning, Speed, and Sabine, the fifth director being J. H. Rhorer.

The books of the general department were kept by Rhorer, and of the savings department by Joshua F. Speed, Jr. In the year 1872, shortly after Rhorer was elected cashier, the bank built what is termed a safety vault, at a cost of fifty-five thousand dollars. The capital stock of the bank was only one hun-

dred thousand dollars, one fifth of which was owned by J. H. Rhorer, the cashier.

Rhorer was not only the cashier and the one-fifth owner of the stock, but as is manifest from the proof in this case, was the leading spirit in directing and controlling the affairs of the bank during the series of years in which he was engaged in making fraudulent entries in the books of the bank to enable him to appropriate its funds to his own use. His entire administration of the affairs of the bank evidences a systematic purpose in embezzling the funds of the institution, and betraying an almost unlimited confidence placed in him by the directors. It was not until the month of January, 1880, that the frauds were discovered, although practiced for the nine years he was cashier, and long before, and then made known by the written acknowledgment of Rhorer, found with the papers of the bank, to the effect that he had been robbing the bank, and had surrendered himself into the custody of the law.

The investigations and settlements made since the assignment show the defalcation to be one hundred and eighteen thousand dollars.

The only question presented in this case is, whether the directors acted in good faith and with ordinary care and diligence in conducting the affairs of the bank, or such diligence as ordinarily prudent men would have exercised with reference to the conduct of such a moneyed institution. It is not a question as to how the frauds of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised.

The directors received no compensation for their services, the benefits to be derived by them from the profits of the bank flowing solely from their interests as stockholders. If their liability is to be measured by that imposed upon the president, or the director, who receives as compensation a sum equivalent to an undertaking to supervise the entire affairs of the bank by an actual inspection and examination of the accounts and books of the bank, as well as the other duties pertaining to such a position, then there would be no question as to the liability of the appellees in this case; but with services rendered that are merely gratuitous, or at least without reward, it cannot be held that a liability is to be fixed upon them for no other reason than their failure to detect the fraudulent entries

made by the cashier in the books of the bank, although extending through a period of nine years.

The facts, however, presented by this record, must determine the question of negligence, or the want of diligence on the part of the appellees.

It was incumbent on the directors to appoint all the officers necessary to carry on the business of the bank, and to use ordinary diligence in the selection of men qualified to fill such positions.

In the year 1871, when Rhorer was elected cashier of the bank, and also made its book-keeper, his past life as a business man, so far as then known, was a sufficient guaranty to the directors of his honesty and capacity for the position. He had been made president of the bank at its organization in 1866, with, as the proof shows, some of the most successful business men in Louisville as the directors, — Guthrie, Speed, and Henning. His experience in banking, as well as his high character for integrity, both personal and financial, commended him to all business men as well qualified for such a position. There was no reason for suspecting his fidelity to his co-directors, and to the interests of the bank whose affairs he had been called on to manage, and yet he was, at the time he was elected president of the savings bank, a defaulter in the savings institution, that had been merged into the former bank, in the sum of seventeen thousand dollars.

It is insisted, as one of the grounds for imputing negligence to the directors, that Rhorer, who had been elected president of the savings bank, and was directed to transfer the balances from the books of the savings institution to the new bank, failed to open new books, but continued to use the old books, and especially the individual ledger containing the accounts of depositors in the savings bank, until its suspension in the year 1880; that this aided Rhorer to cover up his defalcation in the old bank, and to practice his frauds in the new bank, when, if the accounts on the old books had been balanced, and the proper entries made in the new books, the fraud already practiced might have been detected. That a proper and thorough examination of the accounts of the savings institution would have been the safest method for these directors to have pursued, with new accounts open for depositors, must be readily conceded; but Rhorer having been cashier of the old institution, and having, at the time of the merger of the two banks, been elected president of the savings

bank, it was not unreasonable, but consistent with the duty these directors owed to all interested, that Rhorer should have been selected to make the transfer, and to pursue that course that, in his judgment, was proper in opening the books for the new bank.

There was nothing to excite the least suspicion as to his honesty, and it cannot be regarded as neglect on the part of the directors in permitting him to use the books of the old for the purposes of the new bank.

If balances had been struck, and transferred from the old set of books to the new, the fraud already practiced would necessarily have entered into the books of the new bank, as Rhorer, who was directed to make the transfer, would scarcely have made entries that would have resulted in an exposure of his fraudulent practices.

The frauds perpetrated by the cashier in abstracting the money of the bank were committed in various ways: 1. Where deposits, in certain instances, were made, he would credit them on the individual ledger, but make no charge of them on the blotter. In one instance, the Louisville Steel Works is credited on the individual ledger with five thousand dollars, and this sum not credited to the concern or charged to cash on the blotter. Again, the same party is credited by several items, amounting to \$2,719, in the same way.

2. The blotter shows a deposit on January 25th of \$3,898.50, and on that day Rhorer and Cotton are credited with that amount on the individual ledger. On the same day the Metropolitan National Bank of New York is credited on the blotter with \$6,101.50. These two items amount to \$10,000, and the bank on the general ledger is credited by \$10,000. It appears that the Metropolitan Bank was entitled to a credit of \$10,000, when Rhorer only placed to its credit \$6,101.50, and gave credit to Rhorer and Cotton for \$3,898.50, when no such deposit had been made, but by crediting the bank's account in the ledger with the true amount, \$10,000, the accounts appeared correct, and enabled the cashier to appropriate \$3,898.50 to his own use. Another instance is where Rhorer is credited on the blotter with \$350, and this sum is posted to his account in the individual ledger as \$2,350.

Again, he would charge a depositor on the blotter with a certain sum as if paid on the depositor's check. This sum would be posted to his account on the individual ledger, and when balancing the account, the item would be omitted from

the addition. This character of fraudulent entries in the books of the bank was practiced from the year 1871 until the close of the bank in January, 1880, the amount of defalcation concealed by the fraudulent entries amounting in the aggregate to near, if not quite, \$60,000, with the cash found short in the sum of \$58,000. The entire defalcation was \$118,228.57, as reported by the expert accountants in the examination made of the bank accounts.

The principal grounds relied on for a reversal in this case are: 1. That the directors, in giving to Rhorer the sole control of the books of the bank, making him cashier, book-keeper, and teller, placed it within his power to perpetrate the fraud, and for that reason they were guilty of such neglect as make them responsible to the bank; 2. They failed to make proper examinations as to the condition of the bank, and allowed the books to be falsely kept. We have said that it was their duty to exercise that reasonable and ordinary care with reference to the affairs of the bank that ordinarily prudent men would exercise in reference to such business affairs. If it was the duty of the directors to examine the books of the bank in the absence of any reason for suspecting the honesty of the bank's cashier, with a view of testing their correctness with the weekly statements made them, or when making their periodical investigation of the money on hand, and the notes, bills, and bonds belonging to the bank, —it being manifest that the frauds could have been easily discovered at least by a book-keeper of ordinary intelligence, —their responsibility would necessarily follow. It is difficult to define each and every duty pertaining to such a position, but we are satisfied that a bank director is neither required to be an expert or a competent book-keeper, or do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily, or monthly statements made to the board correspond with the general balances upon the books.

In this case, the weekly statements as to the cash on hand, bills discounted, etc., corresponded with the cash account as it appeared each day, or at the time the statement was made, with the cash account on the teller's blotter, where, as in this case, the cash account was kept. It is argued, however, and the expert so states, that these frauds could have been readily detected by comparing a balance on the individual ledger with

the amount stated to be due depositors in Rhorer's weekly statements. It is plain that any director, if at all conversant with book-keeping, could have gone to the individual ledger, and running over the accounts of depositors, and then comparing that with the blotter ending each day's transactions, could have discovered the fraud; or it might have been discovered by ascertaining the amount due each depositor, as appeared from that book; but we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume without a compensation commensurate with the labor required.

If they have selected a cashier and book-keeper regarded at the time as qualified for the position assigned, or used reasonable care and precaution in making the selection, and taken from him a bond in an adequate penalty for the faithful discharge of his duties, his weekly or daily statements, as the custom of banks may be, agreeing with the balances as found on his books, connected with the periodical count of the money, notes, bonds, etc., is all the supervision required, unless the directors have some cause for suspecting, or see that he is neglecting his duties.

In the present case, the cashier made weekly statements to the directors that were compared with the cash balances, and found correct, or if not compared at the time, those statements agreed with the general balance found on the books that were, however, false and erroneous by reason of fraudulent entries and forced balances. They examined the general condition of the bank once in every six months, by making an actual count of the cash, and ascertaining the amount of bills, notes, bonds, and securities on hand, all of which agreed with the statements made by the cashier and verified by the general balance found on the books.

It is argued, however, that as one of the means of preventing such defalcations, it is prudent to have different employees in charge of the books, as checks upon each other, and not intrust those duties to one man. This, no doubt, is the safest course to pursue so as to prevent fraud and have perfect accuracy in the accounts; but the fact that these directors saw proper to confide in Rhorer, and permit him to discharge the double duty of book-keeper and cashier, does not evidence a want of ordinary diligence on their part. If called on to adopt

that mode which would approach nearer to absolute security against such thefts than any other, the usual custom in the banks of a city would be adopted; but the question here presented is, Were the directors, in making such an employment, doing that which men of ordinary prudence in such business would have regarded as unsafe?

We think, measuring the duty of a director by the character of the business he is supervising, the entire testimony in this case gives a negative response to the question. He had been trusted to an unlimited extent, prior to this undertaking, in the conduct of financial transactions involving millions of dollars. He was regarded as a man of means, and worthy of every man's confidence by reason of his supposed great moral worth as well as his financial standing; and no reasonable man, unless exercising the highest degree of care, under the circumstances, would have supposed that a check on his conduct in the bank was necessary, or that any inspection of the books, by way of detecting errors, was demanded. We therefore see no reason for holding these directors personally liable by reason of frauds concealed by a system of false entries, requiring the skill of expert accountants to ascertain, when no breach of duty on the part of the cashier had been brought home to the directors, and the defalcation resulting in no act of their own. J. F. Speed, Jr., who had charge of the books in the savings department of this bank, was an inexperienced book-keeper at the time of his selection, yet his books were accurate, and his fidelity to the bank and its patrons unquestioned. The evidence of honesty and the utmost good faith was found on the side of the youthful book-keeper, while a concealment of fraud was being practiced by the shrewd and experienced financier. Henning and Speed, two of the directors, were in the bank daily, aiding in its control and management. They were both business men, with their capital invested in the stock of the institution, and to adjudge that they were indifferent to their own interests or that of the bank would be a conclusion not sustained by the facts before us.

The case of *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush, 134, is very similar in many of its features to the case before us, in which it was held that the directors were not liable to stockholders for the default of the cashier, unless occasioned by their fraud or gross neglect. The absence of ordinary care was attempted to be shown in that case, because of the failure

of the directors to discover the fraudulent acts of the cashier, such as required the skill of an accountant to develop.

Where directors, by their own act, cause the loss to the bank or the corporation they represent, no doubt as to their liability can arise. Where they discount paper known to be worthless, or cause the cashier or other officer of the bank or corporation to do that which is forbidden by the charter, and loss arises, they will be held responsible: *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *United Society of Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; *Bank v. Hill*, 56 Me. 385; 96 Am. Dec. 470. Here the directors are charged, not with any wrongful act of theirs by which loss has been sustained, but for neglect in failing to do that which they ought to have done. They were ignorant of the thefts being committed, but it is alleged they could have discovered the fraud by the exercise of ordinary diligence. If this action was against the bank, it would not be allowed to say that its directors were ignorant of these frauds, for in such a case the law presumes that the directors know every entry made by its subordinate officers in the bank books, and therefore the misappropriation of funds by a cashier, unknown to the directors, constitutes no defense to the bank; but in an action against the directors to make them personally liable, no such presumption exists, and the burden is on the creditor of the bank to show a want of diligence on the part of the directors in discovering or preventing the fraud. The directors are under no personal liability to the creditors of a bank by reason of a neglect of duty. They are the agents of the corporation, and could only be sued in this case by the creditor because of the refusal of the assignee to sue. They may be proceeded against personally for a conversion of special deposits by them, because guilty of a tort, as in the case of *Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; or in a case where the president and directors are the parties to be charged, there is no reason why the creditor may not sue, making the bank and the directors defendants.

So at last it is the bank suing the directors in this case for a neglect of duty; and if there were no depositors, could the bank claim that the directors were guilty of neglect in permitting Rhorer to act as cashier and book-keeper, or in failing to detect the frauds so manifest after the discovery? We think not.

The appellants also say that the directors were guilty of

neglect in placing certain United States bonds, amounting to thirty-three thousand dollars, in the custody of the Metropolitan Bank, in the city of New York, that were afterwards hypothecated with that bank for money loaned to Rhorer without the knowledge of the directors.

These bonds belonged to the savings side of the bank, the books of which were under the control of Joshua Speed, Jr. This book-keeper reported in his statements these bonds as belonging to the savings side of the bank, and the directors believing them perfectly secure, and having placed them with that bank to enable the bank at Louisville, as Henning states, to draw upon the New York bank whenever it might need money, made no inquiry as to any use that might have been made of them by its bank officers. They had no reason to believe that Rhorer had pledged them as collateral to raise money that he might increase the fund in the home bank upon which to plunder; and we perceive no reason for holding them guilty of an imprudent act in depositing them with the New York bank for the purposes mentioned by Henning, one of the directors. They, it is true, might have suspected Speed of using them for his purposes if his honesty had ever been questioned or doubted by them, or they might have suspected Rhorer of stealing the bonds from Speed or the New York bank; but as no cause existed for suspecting either of the book-keepers, the depositing of the bonds with the bank in New York did not constitute any character of neglect, as it was proper that they should do so under the circumstances.

In regard to the Semple bonds belonging to Caperton, and that were used in his absence, in the statements as to the condition of the bank by Rhorer, as assets of the bank, it appears that the bank was in the habit of investing in bonds, and whether these bonds were all of the series of the Semple bonds does not appear. Rhorer exhibited them to the other directors as belonging to the bank, and how they were to know they had been charged to the account of Caperton is difficult to perceive. They did not suspect Rhorer of deception. The bonds were in the vaults of the bank, and exhibited as part of the assets. If it was their duty to examine Caperton's account in order to prevent fraud on the part of the cashier, their liability might be asserted; but even if Caperton had been present, with a series of bonds of a like character, he would doubtless have not suspected Rhorer of using his bonds as assets of the corporation. Nothing occurred during the

interval between 1871 and 1880 that called the attention of the directors to the individual ledger, or to a minute examination of any book connected with the corporation.

In the case of *Scott v. De Peyster*, 1 Edw. Ch. 518, the cashier or treasurer of the corporation embezzled the funds by a series of frauds running through several years, in a manner much like the cashier did in this case. The stockholders attempted to make the directors liable on the ground of neglect, etc. The court, in discussing the facts of that case, said that "such subordinates [alluding to the cashier] must be supposed to act honestly until the contrary appears, and the law does not require their employers to entertain jealousies and suspicions without some apparent reason." And further said the court: "I think the question, in all such cases, must necessarily be, whether they [the directors] have omitted that care which men of common prudence take of their own concerns."

In the case of *Manhattan Co. v. Lydig*, 4 Johns. 389, it is said, on this question of diligence: "The examinations of the bank by the committee of directors were in the usual way, and the fraud practiced eluded detection by means of a false balance-sheet. It is not for the court to point out the mode banks are to pursue to detect frauds; but if they take the usual and uniform method adopted not only by this but by other banks, they cannot be subject to the charge of negligence." And if the mode adopted by business men in such cases is to fix the measure of diligence, or determine the question of neglect, as said by Lord Hatherley in *Turquand v. Marshall*, L. R. 4 Ch. 382, then these directors are relieved from liability. Taking the entire testimony of bankers in this case, and these directors were as vigilant or more so than the directors of other larger moneyed institutions; and to hold them responsible, under the facts presented, would be to deter business men from accepting the position of a director, when by doing so they are required, in effect, to insure the honesty of bank subordinates by being made responsible for their fraudulent acts. We have considered other questions of neglect made in this case involving fraudulent overdrafts, and the fact of notice given a man, supposed to be perfectly honest, of the day on which his money as cashier was to be counted,—in all of which we perceive no want of ordinary diligence. These directors were the principal stockholders. Their own interests were involved to a greater extent than

that of the depositors. They were business men; two of them were almost daily at the bank. The assets of the bank will pay eighty or ninety cents to the dollar; and if they paid less, it could not affect the question here. They (the directors) have conceded their neglect in the particular of failing to have ample security to the bond of the cashier. They have made that neglect good by accounting to the bank for the penalty of the bond, which was twenty thousand dollars. They have exercised ordinary diligence in the discharge of their official duties, and suffered loss, in common with the appellants, by the frauds of a cashier in whom they all had the right to confide.

The judgment below is affirmed.

BANKS AND BANKING. — Directors of a bank are not liable for the dishonesty or negligence of the bank cashier, or other bank officers, when they themselves are guilty of no negligence or dishonesty: *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Godbold v. Bank of Mobile*, 11 Ala. 191; 46 Am. Dec. 211; *Lawson's Rights and Remedies*, sec. 521. Compare *United Society of Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731.

McDANELL v. LANDRUM.

[87 KENTUCKY, 404.]

LIMITATION OF ACTION AGAINST MARRIED WOMEN. — Under chapter 52, article 2, section 5, General Statutes of Kentucky, authorizing a wife abandoned by her husband to sue and be sued only after being empowered to do so by judgment of a court of equity, and under chapter 71, article 1, section 2, General Statutes of Kentucky, providing that if at the time the right of any person to bring an action for the recovery of real property first accrued such person was a married woman, she may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed; the three years' limitation commences to run from the date of the judgment, and not from the date of abandonment.

MARRIED WOMEN — ESTOPPEL — RIGHTS OF PURCHASER. — Where a wife and her husband institute an action in which a judgment is rendered for the sale of her land to enable her to convey a good title, and after such sale to a *bona fide* purchaser the proceeds are invested in real estate in her name and for her benefit, she is estopped, after having acquiesced in the sale for twenty years, from dispossessing the purchaser, though the deed did not convey a perfect title except upon the equitable terms of restoring the *statu quo*.

MARRIED WOMEN — ESTOPPEL. — A married woman cannot profit by her own fraud to the prejudice of a *bona fide* purchaser from her. Therefore, if she has received and invested the proceeds of a sale of her lands to him conveying an imperfect title, by purchasing other lands for her use

and benefit, she is estopped from dispossessing him except upon refunding the purchase-money, and paying for such necessary improvements as may have been made in good faith.

George C. Drane, for the appellant.

Warren Montfort, for the appellee.

LEWIS, C. J. In 1863, appellee, then under disability of both coverture and infancy, and her husband, W. H. Landrum, sold to her brother, W. H. Beal, at sixteen hundred dollars, a tract of twenty acres of land she had inherited from her father, and Beal immediately sold it at the same price to T. J. Turpie. But the latter, advised appellee could not make a good title, refused to pay the purchase-money or accept a deed. Whereupon, she and her husband instituted an action, making Beal and Turpie defendants, in which judgment was rendered for a sale of the land upon condition it brought as much as sixteen hundred dollars. At the sale made under that judgment, Beal became purchaser at the sum mentioned; and having, as appears from the record of the action, paid it to plaintiff's attorney, a deed for the land was, in March, 1864, made to him by a commissioner of court. In April, 1864, Beal sold and conveyed it to Turpie, and the latter, in October, 1864, conveyed it to appellant, who has held and claimed it ever since.

September 18, 1884, appellee instituted an action ordinary, subsequently transferred to equity, to recover of appellant the land and damages.

It is apparent, and seems to be conceded, that the judgment rendered in the action instituted by appellee and her husband in 1863 was not effectual to divest her of title to the land. But appellant pleaded as defenses, and it is contended for him on this appeal, that the action is barred by limitation, and that by her conduct in procuring the judgment of 1863, and appropriating in her own name and for her use the proceeds of sale made in pursuance of it, she is now estopped to claim the land.

1. Section 2, article 1, chapter 71, General Statutes, provides that if at the time the right of any person to bring an action for the recovery of real property first accrued such person was a married woman, she may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed. It appears that appellee's husband abandoned her about ten years before the

institution of this action, and they have not since cohabited. And hence, it is argued, her disability to sue having thus been, in the meaning of the statute, removed, she might have then brought this action, and not having done so within three years after the expiration of the period of fifteen years, she cannot now maintain it.

Abandonment of the wife by the husband does not *ipso facto* remove her disability. On the contrary, section 5, article 2, chapter 52, General Statutes, as construed by this court in the case of *Hannon v. Madden*, 10 Bush, 664, authorizes the wife in such case to sue and to be sued only after being empowered to do so by judgment of a court of equity.

It is stated in her petition, and not denied, that no judgment giving her such power was rendered until the September term, 1884, of the court, only a few days before the commencement of this action, and as the three years had not then elapsed, the plea of limitation cannot avail.

2. It satisfactorily appears that the purchase of the land in the first instance by the brother of appellee was made at her urgent solicitation, and that the action to procure a judgment for the sale was brought with her knowledge and approbation after the advice was given that she could not effect a sale and collect the purchase price without such proceeding.

It further appears that the land was so situated and in such condition that it could not be cultivated by her husband and herself profitably, as neither of them then had any other estate of much value, and a sale and reinvestment of the proceeds in her name was, at the time, really to her interest. The proceeds of the sale were not immediately reinvested in her name, but it clearly appears that in 1865 they were used to purchase in her name and for her use real estate in Madison, Indiana, where she and her husband removed.

It is a rule founded upon justice and common fairness that a married woman, no more than others, can take advantage of her own wrong; for, as said by this court in *Rusk v. Fenton*, 14 Bush, 491, 29 Am. Rep. 413, "coverture will not be permitted to be invoked and used as a cloak to fraud." It has been more than once decided by this court that a woman who, by her conduct, induces the belief on the part of a purchaser of real estate that she has no claim to dower in it, is equitably estopped from afterwards asserting it against him: *Craddock v. Tyler etc.*, 3 Bush, 360; *Connolly etc. v. Branstler*, 8 Id. 702; 96 Am. Dec. 278.

In the case of *Stone and Wife v. Werts*, 3 Bush, 486, is this language: "If a party, having an interest in preventing an act being done, acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge the act to their prejudice: 2 Story's Eq. Jur. 756; and *a fortiori* is this so when, as in this case, the party complaining of an act to his prejudice has procured it to be done by a representation of facts inconsistent with his subsequent claim; and married women are not exempt from the operation of this rule." The doctrine of estoppel, however, has not been so rigidly enforced in this state as to absolutely preclude recovery of real estate of a woman attempted to be conveyed during her coverture by defective or illegal conveyance, although she may have voluntarily joined in the deed, or instigated the sale. In such case the rule is, that a married woman cannot be permitted to profit by her own fraud to the prejudice of a purchaser in good faith, and, therefore, if she has received and invested the proceeds of such sale in other real estate for her use and benefit, she should be put upon the terms of refunding the purchase-money and paying for such necessary improvements as may have been made in good faith: *Heck v. Fisher*, 78 Ky. 643; *Hawkins v. Brown*, 80 Id. 186.

There is nothing in this record to show that either appellant or his two vendors, Beal and Turpie, acted in bad faith, or paid less for the land than a fair value. On the contrary, the proceedings for the sale were instituted by appellee and her husband. The sale was a judicious one, and appellee got the full benefit of the money for which it was sold. And having acquiesced for twenty years, we think, if she be now permitted to dispossess appellant, it should be upon the equitable terms of restoring the *statu quo*.

Wherefore, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

MARRIED WOMEN — STATUTE OF LIMITATIONS. — Where by statute married women control their separate property, the statute of limitations runs against them the same as against a *feme sole*: *Castner v. Walrod*, 83 Ill. 171; 25 Am. Rep. 369. For the general rule of application of the statute of limitations to married women, see extended note to *Moore v. Armstrong*, 36 Am. Dec. 69-71.

MARRIED WOMEN — ESTOPPEL. — Doctrine of estoppel applies to married women: *Orenshaw v. Julian*, 26 S. O. 283; 4 Am. St. Rep. 719, and note 724;

Lane v. Schlemmer, 114 Ind. 296; 5 Am. St. Rep. 621, and note 626; *Big- ham's Appeal*, 123 Pa. St. 262; 10 Am. St. Rep. 522, and note 529; *Cook v. Walling*, 117 Ind. 9; 10 Am. St. Rep. 17, and note 21. A married woman may by acts *in pais*, done without any intentional fraud, estop herself from asserting title as against innocent persons misled by her acts: *Galbraith v. Lunsford*, 87 Tenn. 89, which case disapproves the case of *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593. See note to *Shivers v. Simmons*, 28 Am. Rep. 374-377; note to *Cravens v. Booth*, 58 Am. Dec. 114-117; note to *Reis v. Lawrence*, 49 Am. Rep. 87-92, with reference to the doctrine of estoppel as applicable to married women.

CURRY v. CURRY.

[87 KENTUCKY, 667.]

SUBROGATION — TRUSTS — RIGHTS OF CO-OBLIGORS. — Where a note and mortgage are executed to one party in such manner that he holds them in trust for the benefit equally of himself and his co-obligors on another undertaking, the trust inures to the exclusive benefit of any of the co-obligors who pays off the joint obligation.

SUBROGATION — VOLUNTARY PAYMENT BY AGENT. — An agent who pays money out of his own pocket to protect the estate of his principal in his charge is not a volunteer, and is entitled to all the equities that his principal would be entitled to had he paid the demand himself.

Montgomery and Jones, for the appellants.

H. C. Baker, for the appellees.

BENNETT, J. It appears from the weight of the evidence in this case that James Curry, by an arrangement with the appellant, borrowed of Hunter and Rowe two hundred dollars for the use of the appellant, and executed his note, secured by mortgage, for said sum; that afterwards it became desirable to make some other arrangement in reference to securing the payment of said loan so as to release the mortgage executed by James Curry to secure the payment of the loan. So, at the request of the appellant, a plan was entered into by which the appellee George W. Curry, A. M. Petty, and others, executed a joint note to Hunter and Rowe for said two hundred dollars, due and payable in twelve months from date. It was also agreed that the appellant was to give a mortgage on his land (the two hundred dollars originally borrowed having been used for the purpose of finishing paying for said land) to secure the obligors on said note.

The appellant, as appears from the exhibits filed, did, on the same day that the note was executed by the appellee Curry, and others, execute to A. M. Petty, one of said obligors,

his promissory note, due twelve months from date, for the sum of two hundred dollars; the note recites that it was secured by mortgage. In a short time thereafter the appellant and his wife did execute a mortgage on said land to secure the payment of said note. It also appears, from the weight of the evidence, that said note and mortgage were executed to A. M. Petty for the purpose of carrying out the agreement that the appellant had made with the said obligors to indemnify them. Before the note executed to Hunter and Rowe was paid, A. M. Petty died intestate, unmarried, and without issue, whereby his father, who was living, became his heir at law. The father thereafter died, but, in the mean time, no administrator was appointed to take charge of A. M. Petty's estate, and the appellee James N. Petty, who was managing said estate at the request of his father and for his benefit, paid off one half of the note on which was A. M. Petty and the appellee George W. Curry, etc.; and the appellee Curry paid off the other half. At the time of said payment, the appellant, desiring further indulgence, and it being apprehended that the land was not sufficient security, executed to the appellee Curry a mortgage on some personal property for the purpose of additionally securing said sum. After the death of A. M. Petty's father, an administrator was appointed on the estate of A. M. Petty, who assigned the note and mortgage which the appellant executed to A. M. Petty to the appellees George W. Curry and James M. Petty, which assignment was made in consideration of appellees having paid off the note to Hunter and Rowe.

Although the note and mortgage were executed by the appellant to A. M. Petty alone, yet he held them in trust for the equal benefit of himself and co-obligors; and said trust would inure to the exclusive benefit of any one of said obligors who might pay off said joint obligation.

It is said, however, that the appellee Petty was a volunteer pay-master to the extent of one half of said debt; and, for that reason, he is not entitled to the benefit of said lien.

This position cannot be sustained, for the reason, among others, that the appellee Petty did not volunteer to pay any debt on which the appellant was bound; he cannot complain, therefore, that the appellee intermeddled with his affairs. If it be true that he was an intermeddler in the affairs of any one for the purpose of making such one his debtor, such intermeddling related to the estate of his brother, A. M. Petty; but the administrator thereafter, so far from treating him as an

intermeddler, ratified his act, and assigned to him, as an indemnity, the note and mortgage which he held as administrator on the appellant.

But James N. Curry was not an intermeddler; for it appears from the proof that he was managing the estate of A. M. Petty as the agent of his father, who was entitled to the estate as the heir of his son; and to discharge the demand upon the estate, which was being pressed for payment, he paid one half of the demand out of his own means; George W. Curry, one of the obligors on the note, paying the other half. It is well settled that an agent who pays money out of his own pocket to protect the estate of his principal that is in his charge is not a volunteer, and he is entitled to all the equities that his principal would be entitled to had he paid the demand himself.

The judgment of the circuit court subjecting the land mortgaged to A. M. Petty, and the personal property mortgaged the appellee George W. Curry, to the payment of the amount paid to Hunter and Rowe by the appellees, together with interest thereon, is affirmed.

SUBROGATION, AS TO THE RIGHT OF, GENERALLY, and the circumstances under which it arises: See *Insurance Co. of N. A. v. Fidelity etc. Co.*, 123 Pa. St. 523; 10 Am. St. Rep. 546, and note 549; *Niagara F. Ins. Co. v. Fidelity etc. Co.*, 123 Pa. St. 516; 10 Am. St. Rep. 543, and note 545; *Iverson v. McMullen*, 113 N. Y. 293; 10 Am. St. Rep. 445, and note 450; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83, and note 87; *Perry v. Adams*, 98 N. C. 167; 2 Am. St. Rep. 326, and extended note 328-330.

In the case of *Taylor v. Farmers' Bank of Kentucky*, 87 Ky. 398, it appeared that William Timberlake drew a bill of exchange upon Henry C. Timberlake in favor of John W. Menzies. The latter indorsed the bill for accommodation, and then delivered it to Henry C. Timberlake for whose benefit it was negotiated to the Farmers' Bank of Kentucky. After judgment had been recovered against both the Timberlakes and against Menzies, Henry C. Timberlake and his wife executed a mortgage on her separate property to Menzies to secure him against any loss to him as such indorser; but the mortgage declared that it was not made to secure any part of the claim which Menzies might "avoid by any and all lawful efforts." He was in fact insolvent, and did not pay any part of the bill which he had indorsed. A suit was brought by the assignee of the bank to be subrogated to all the rights of Menzies under such mortgage, and to subject Mrs. Timberlake's land to the payment of the judgment on the bill of exchange. The trial court having decided against the complainants, the appellate court, in affirming that decision, said: "The rule is well settled that where a security is given by a principal to his surety, it operates *eo instanti* as a security to the creditor for the payment of his debt. This right of the latter cannot be defeated even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a *bona fide* purchaser without notice; and if contingent, the surety cannot defeat it after his liability becomes fixed. The reason of this rule is,

that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity with all the rights of the surety. In such a case, the security is for the debt, as well as the ultimate protection of the surety. It is at once clothed with a trust character; and the creditor immediately acquires a right and interest in it that cannot be defeated by the act of the surety. He becomes a trustee for the creditor. So, too, upon like principles of justice or natural equity, where a principal indemnifies one of several sureties, he becomes a trustee for the others, and each is entitled to share the indemnity. The estate of the principal is liable for the debt, and his obligations to them are equal.

"A different state of case is presented, however, where the contract of indemnity is by a stranger to the debt, and for the personal benefit of the surety merely, in opposition to the idea of a trust for the payment of the debt. In such a case the indemnity is not out of the estate of the principal. It was said in the case of *Osborne etc. v. Noble*, 46 Miss. 449: 'We think the principle has been stated and enforced, that if the security be purely personal, as to indemnify and save harmless the surety, and not for the better protection of the debt, or intended as a fund for its payment, a trust does not attach to it for the creditor.' Here Mrs. Timberlake was in no way liable for the debt. The fact that she was the wife of Henry C. Timberlake makes no difference. The indemnity was not out of his estate. The wife was under no obligation to pay the debt; and must be regarded, as indeed she was, as a stranger to it. It was no fraud upon the creditor to merely indemnify the surety. As the property belonged to her, if the mortgage created no lien to secure the payment of the debt, then no trust was created in favor of the creditor, since it is certain that the bill of exchange was not accepted upon the faith of the indemnity. It was not furnished to the surety until long after the creation of the debt, and indeed not until suit was brought upon it. Her contract must be regarded as one merely to save the surety harmless; as undertaking merely to indemnify him against the payment of the debt; and pledging the mortgage property to him for whatever he might be compelled to pay, and not as security for the payment of the debt. It is true the mortgage recites: 'The said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim, which he may avoid by any and all lawful efforts'; but when the entire instrument is considered, it is evident the purpose was merely to indemnify Menzies. This being so, no right of subrogation exists in behalf of the appellants. Their claim is not supported by that equity which would attach to it if the debt had been accepted upon the faith of an indemnity created by the mortgage for its payment. These views are supported and ably enforced by the opinions in the cases of *Leggett v. McClelland*, 39 Ohio St. 624, and *Macklin etc. v. Northern Bank of Kentucky*, 83 Ky. 314; and the judgment below is affirmed."

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

MANNING v. SPRAGUE.

[148 MASSACHUSETTS, 18.]

CHAMPERTY. — Agreement is not champertous by which an attorney was to receive a certain per cent of the amount recovered for his services and expenses in the prosecution of a claim for the destruction of property by a confederate cruiser before the court of commissioners of Alabama claims, the proceeding before such tribunal being an inquest, and not a trial or a lawsuit.

CONTRACT for the breach of an agreement to employ the plaintiff, an attorney at law, to prosecute a claim for damages before the court of commissioners of Alabama claims, for the destruction of a ship by confederate cruisers. As a part of the transaction employing the plaintiff to prosecute the claim, the defendant agreed to allow and pay the plaintiff "an amount of money equal to nine (9) per centum of any sum or sums of money awarded, decreed, and paid." After the plaintiff had performed certain preliminary services, he was notified by the defendant that the latter had employed other attorneys to prosecute the claim. Subsequently, such attorneys filed a petition for damages on behalf of the defendant, and procured an award of a considerable sum. The defendant requested the court to rule that the agreement was champertous, but the court ruled that it was valid and binding, whereupon the defendant alleged exceptions.

C. Cowley, for the plaintiff.

C. T. Russell, Jr., for the defendant.

DEVENS, J. The only question raised by the bill of exceptions, as conceded by the defendant in his brief, is, whether the executory contract upon which the plaintiff depends was champertous and illegal.

The original act by which the court of commissioners of Alabama claims was constituted was approved by the President of the United States on June 23, 1874, and the same tribunal was re-established by the act approved June 5, 1882: 18 U. S. Stats. at Large, 245; 22 Id. 98. The contract here in question was made on the 21st of June, 1882, a few days after the passage of the latter act. We shall have no occasion to consider whether this contract would have been voidable by reason of champerty if the services to be rendered or advances to be made which it contemplated were to have been rendered or made in a strictly legal proceeding, such as a suit at law by the defendant against another party, and whether it would, under such circumstances, have come within the definitions of champerty or maintenance, as these are found in our decisions: *Sweet v. Poor*, 11 Mass. 549; *Brinley v. Whiting*, 5 Pick. 347; *Scott v. Harmon*, 109 Mass. 237; 12 Am. Rep. 685; *Blaisdell v. Ahern*, 144 Mass. 393; 59 Am. Rep. 99.

Champerty is a species of maintenance, and is so termed because, by a champertous contract, the money or land to be obtained by legal proceedings is to be divided between the party bringing and the party promoting the suit. Maintenance is an offense by the common law and by the statute 32 Hen. VIII., c. 9, which, in *Brinley v. Whiting*, *supra*, is said to have been adopted in this commonwealth. It is defined by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it": 4 Bla. Com. 134. The grounds upon which contracts were held voidable for champerty or maintenance, as against the policy of the law, were, that there might be combinations of powerful individuals to oppress others, which might even influence or overawe the court, and that they tended to the promotion and enforcement of unfounded claims, to disturb the public repose, to promote litigation, and to breed strife and quarrels among neighbors. With the progress of society, these reasons have everywhere lost much of their force, and the whole doctrine on this subject has been rejected in several states of the Union as antiquated, and incongruous in the existing state of society, notably in New Jersey, Texas, California, and Mississippi

Without desiring to modify or in any way recede from the doctrine on this subject as it has heretofore been held in Massachusetts, we see no reason for its further extension.

Neither the definition of champerty, nor the reasons why it was held to be an offense, have any proper application to a proceeding such as that by which the defendant, under his contract with the plaintiff, sought to enforce his claim against the government of the United States. There was no suit to be brought, nor any defendant in the proposed proceeding, in the same sense that there is in a contested cause at law or in equity. Acknowledging its liability to certain classes of our citizens who had suffered by the depredations on our commerce, during the Civil War, to the extent of the sum received from the government of Great Britain, which had been held responsible therefor, the United States ordered this sum to be distributed among them. The first class of claimants described by the act was to receive its claims in full, if this amount would satisfy them; otherwise *pro rata*. This class being satisfied, the second class was to receive its claims in full, if the amount remaining would satisfy them; otherwise *pro rata*. The judgments rendered were to be paid from the treasury of the United States, through the officers of that department. These judgments were to be rendered, and the distribution was to be made, after hearing upon proper notice all parties who should seek to bring themselves within the classes described in the act.

While the commissioners were called a court, and were clothed with many of the attributes of one for the purpose of conducting their investigations efficiently, many of the characteristics of a judicial tribunal were wanting. It was provided that an officer, appointed by the attorney-general of the United States and acting under his supervision, should attend their sessions, but it was only to see that pretended claims were not allowed, to the injury of those entitled to the benefit of the fund, and thus that there was a fair division of it. The proceeding before this tribunal was an inquest, as distinguished from a trial or a lawsuit. The action of the tribunal was that of a committee to which the inquiry as to the division of the fund was confided. There could be no final action as to any claim until it was decided what claims should be allowed to participate in the division. There was no appeal, either in law or fact, from any of the decisions of the commissioners. There was no contest to ensue between contending parties before it,

and no strife which could be stirred up between them. Indeed, if it was found by them that a particular loss was the proper subject of a legal claim, but that there was a controversy as to who was entitled to the claim and to receive the benefit of it, the commissioners, following *Comegys v. Vasse*, 1 Pet. 193, held that they could not decide it. While they could decide conclusively upon the amount and validity of claims, they could not determine the conflicting rights of parties to the sum awarded. That was to be finally determined in some other tribunal: Hackett's Geneva Award; *McLeane v. United States*, Davis's Report of Decisions of Commissioners, 112; *Heard v. Sturgis*, 146 Mass. 545.

The plaintiff by his contract proposed to be a party, as the representative of the defendant, to this inquiry as to the amount and validity of his claim only. No suit was to be brought, no litigation initiated, by him. His agreement was not, therefore, voidable, in our view, because his contemporaneous agreement for the fees he was to receive for his services and expenses was for a sum equal to nine per cent of the claim which might be recovered.

In *Wright v. Tebbitts*, 91 U. S. 252, it was held that a commission called together in pursuance of a treaty stipulation to settle and adjust disputed claims, with a view to their ultimate payment and satisfaction, is for that purpose a *quasi* court, and that there is nothing illegal, immoral, or against public policy in an agreement by an attorney at law to present and prosecute a claim before it, either at a fixed compensation or at a reasonable percentage on the amount recovered. The commission referred to in this decision differed in no essential respect from the court of commissioners of Alabama claims. To the same effect is *Wylie v. Coxe*, 15 How. 415. *Stanton v. Embrey*, 93 U. S. 548, holds that a contract to prosecute a claim before one of the executive departments for a contingent fee is not illegal. Nor do we think any distinction can be made because in the cases cited it does not appear that any expenses were to be paid by the attorney, which to some extent appears to have been contemplated in the present case.

The contract in the case at bar, while made in Massachusetts, was to be performed in Washington, before a tribunal of the United States.

Exceptions overruled.

CHAMPERTY — WHEN LAW OF IS OR IS NOT APPLICABLE: *Greer v. Winteremith*, 85 Ky. 516; 7 Am. St. Rep. 613, and cases collected in note 619; *Stanton v. Haskin*, 1 McAr. 558; 29 Am. Rep. 612. Champerty avoids every contract into which it enters: *Martin v. Clarke*, 8 R. L. 389; 5 Am. Rep. 586. A contract by which an attorney depends on the contingency of success for payment for all services, and the client agrees to furnish evidence and pay all actual costs, and that the attorney shall be entitled to large and liberal fees, not to exceed fifty per cent of the amount collected, is not champertous nor void for maintenance: *Blaisdell v. Ahern*, 144 Mass. 393; 59 Am. Rep. 99. To the same effect, see *Scott v. Harmon*, 109 Mass. 237; 12 Am. Rep. 685; *Duke v. Harper*, 66 Mo. 51; 27 Am. Rep. 314. But a contract between an attorney and his client that the attorney shall prosecute a claim at his own cost for a share of the recovery is champertous and illegal: *Martin v. Clarke*, 8 R. L. 389; 5 Am. Rep. 586.

CHAMPERTY — RECENT CASES. — Champerty is a bargain with plaintiff or defendant for a portion of the matter sued for in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense: *Nickels v. Kane*, 82 Va. 309. An agreement between an attorney and client by which the attorney is to collect by suit a claim, and his fee is to consist of a part of such claim, is champerty: *Widley v. Crane*, 63 Mich. 720. An agreement by creditors to pay a person, to collect their claims, parts of the amounts collected, but to bear themselves no part of the expenses of collection, is champertous: *Lancy v. Havender*, 146 Mass. 615; but such an agreement is not champertous where the creditors agree also to bear the burden of the costs: *Oultman v. Waddle*, 40 Kan. 195. See also note to *Bowman v. Phillips*, 13 Am. St. Rep.; *Bradford v. Foster*, 87 Tenn. 4.

GLOVER v. DWIGHT MANUFACTURING COMPANY.

[148 MASSACHUSETTS, 22.]

NEGLIGENCE — FAILURE OF MASTER TO INSTRUCT MINOR SERVANT ABOUT MACHINERY — NEGLIGENCE OF MASTER WHEN QUESTION FOR JURY. — In an action against a manufacturing company to recover damages for injuries sustained by a girl thirteen years old, because of the alleged failure to give proper instruction while attempting to clean a wheel of the spinning-frame on which she had been set to work, where she testified that she had never been told how to clean the wheel, but attempted to clean it as she had seen other operatives do; that to clean the wheel properly one spoke at a time was wiped, and to bring the spokes successively into position, it was necessary to give the wheel a partial revolution each time by means of a peculiar movement of the shipper above the frame, but that she had never been instructed how to give this motion; that she knew the wheel must be still in order to wipe it, and had never before attempted to clean it when the power was on; that after wiping one spoke she gave the wheel a motion, as she had observed the other girls do, supposing that it would partially revolve, and leave the next spoke in position, and that while in motion she attempted to pick off some waste, but the wheel went faster and farther than she expected, and her finger was caught between the spoke and the frame, — it was

held that, although the plaintiff's testimony was directly contradicted, the jury having viewed the premises, the case was properly submitted to the jury, and a verdict in favor of the plaintiff would not be disturbed.

TORT by Sarah Glover, aged thirteen years, against the Dwight Manufacturing Company, to recover damages for injuries sustained by her while in the defendant's employ. The facts are sufficiently stated in the opinion. The judge refused to rule, upon the evidence, that the plaintiff could not maintain her action, and submitted the case to the jury. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. B. Carroll, for the plaintiff.

W. W. McClench, for the defendant.

MORTON, C. J. At the trial the plaintiff relied upon the last count in her declaration, in which she alleges that she was injured by the negligence of the defendant in not giving her proper instructions as to starting, stopping, and cleaning the machine upon which she was set to work. The duty of an employer to take proper precautions for the safety of a person employed in running or tending machinery, and where such person is young and inexperienced, to give him proper instructions so as to enable him to understand and appreciate the danger attending his employment, is fully considered in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 8 Am. Rep. 506.

In the case at bar, the plaintiff, a girl of thirteen years of age, was set to work upon spinning-frames, her duty being to piece up ends, to keep the roping in, and to clean up. In attempting to clean a wheel at the end of the spinning-frame, her finger was caught between a spoke of the wheel and the end of the frame, and she was injured. She testified that she had never been told how to clean the wheel, but attempted to clean it by doing as she had seen the other help do; that she had never before attempted to clean a wheel when the speed was on; that "the proper way to clean the wheel was to wipe one spoke at a time with a piece of waste, and in order to bring the spokes into position to be wiped, it was necessary to give the wheel a partial revolution each time by means of a peculiar movement of the shipper above the frame"; and that "she had never been instructed how to give this peculiar motion to the shipper in order to secure a partial revolution of the wheel."

The jury viewed the premises, thus gaining a clear knowledge of the character of the machinery, and, if they believed the plaintiff, were justified in finding that the defendant was guilty of negligence in setting the plaintiff to work upon dangerous machinery without giving her proper instructions. It is true that the plaintiff was directly contradicted by witnesses called by the defendant; but it is peculiarly within the province of the jury to judge between conflicting witnesses, and we cannot say, as matter of law, that they should believe one witness rather than another. They believed the plaintiff, and found that the defendant was negligent in failing to give her proper instructions as to managing the machine.

But the defendant contends that, if this be so, yet the plaintiff has not proved that her injury was caused by such failure to instruct her. She testified that she knew that the wheel must be still in order to wipe it; that, after wiping one spoke, she gave the wheel a motion, as she had observed the other girls do, supposing that it would give it a partial revolution, and that it would stop and leave the next spoke in proper position to be wiped; that while it was in motion she attempted to pick off a little piece of waste; and that it went faster and farther than she expected, and caught her finger between the spoke and the frame. Upon her evidence, it was competent for the jury to find that the injury was caused by the defendant's negligence. They may have been satisfied that if she had been properly instructed how to give the peculiar motion of the shipper which would produce a partial revolution, the accident would not have happened. It is not an unreasonable presumption that if she had known how to give this peculiar motion she would have done so, and the accident could not have happened.

The defendant also contends that the plaintiff was not in the exercise of due care. She must show that she exercised such care and prudence as can reasonably be expected of a girl of her age and capacity: *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645. We cannot say that she knowingly or recklessly put herself in a position of danger. If she believed that she had given a motion to the wheel which would cause only a partial revolution, there was no apparent danger or conscious imprudence in attempting to pick off a piece of waste from the spoke. It was for the jury to decide how far they believed her, and whether or not she was in the exercise of due care. We must assume that the case was submitted to the jury with

all proper instructions, and we cannot say, as matter of law, that their verdict was not justifiable.

For these reasons, a majority of the court is of opinion that the exceptions should be overruled.

Exceptions overruled.

MASTER AND SERVANT. — DUTY OF MASTER TO INFANT OR MINOR EMPLOYEE is to warn and instruct him regarding the dangers of the employment, and the means of avoiding them. This duty performed, the minor thereafter stands on the same plane with other servants with respect to the risks incident to the employment: *Risk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 28. An omission to instruct a boy seventeen years old as to the risks of employment, when he was employed to handle a simple machine similar to one he had been handling for six months previously, is not negligence upon the part of the master: *Crowley v. Pacific Mills*, 148 Mass. 228; to the same effect substantially is *Ciriack v. Merchants' Woolen Co.*, 146 Id. 182.

MASTER AND SERVANT — MINOR EMPLOYEE. — A complaint is sufficient where it states that an inexperienced boy of fifteen years was put to work with machinery which the master knew to be dangerous, but of which he did not inform the boy, alleging that such machine was dangerous in the particular which caused injury to the boy: *Danley v. Scanlon*, 116 Ind. 8.

CARLL v. EMERY.

[148 MASSACHUSETTS, 82.]

TRANSFER IN FRAUD OF CREDITORS — RECOVERY OF PROCEEDS OF PROPERTY. — Debtor, who transfers property with intent to delay and defraud his creditors, to a third person who has knowledge of the fraud, upon an agreement that the proceeds shall be accounted for to him, may, after notice to such third person of the abandonment of his fraudulent purpose and demand of repayment, recover from him such proceeds for the benefit of his creditors.

CONTRACT to recover the proceeds of certain checks transferred by the plaintiffs to the defendants. The plaintiffs had a verdict, and the case was reported for the determination of this court. The facts are stated in the opinion.

C. W. Sumner, for the plaintiffs.

J. M. Day, for the defendants.

DEVENS, J. The checks which were indorsed by the plaintiffs to the defendants, for the proceeds of which the defendants agreed to account to them, were so transferred, as the evidence tended to show, with a view to delay and defraud the plaintiffs' creditors, and of this purpose both parties were

cognizant. At a subsequent period the plaintiffs went into insolvency, and sought to avail themselves of the property for the purpose of satisfying their creditors to the extent of its value. For this purpose they demanded the proceeds of the checks of the defendants, who were apprised of the intention of the plaintiffs, and of the object to which such proceeds were to be devoted. The defendants having refused this demand, the plaintiffs, who had made an offer of compromise to their creditors, paid into the court of insolvency a sum which exhausted all their assets, including the amount of the checks transferred to the defendants. This sum was obtained partly by a loan made to them by one Chase, to whom they assigned their claim against the defendants for the proceeds of the checks, and for whose benefit this action was brought.

The defendants requested an instruction to the jury, that, if they were satisfied on all the evidence that the checks were transferred to them "in order to prevent the plaintiffs' creditors from reaching the same by attachment or other legal means, or to hinder and delay said creditors in their lawful attempts to avail themselves of said checks or the proceeds thereof in payment of their lawful demands, this action cannot be maintained." This request was refused, and the jury were instructed: "If the jury find that the defendants received those checks to have them cashed for the benefit of the plaintiffs, and received the money therefrom, and the plaintiffs thereafter demanded the same of the defendants for the purpose of paying a composition made in insolvency with their creditors, of which purpose the defendants were apprised, and the defendants refused to pay over said money to the plaintiffs or their order, then this action may be maintained, although the said checks were originally placed in the hands of the defendants for collection, in order to hinder, delay, or defraud creditors."

We have no occasion to consider whether the defendants could have been permitted to defeat the contract they had made by proof that they had participated in a fraud upon the plaintiffs' creditors, or whether the transaction described in the request was not valid between the parties, and thus that it could have been avoided only by creditors, or whether even creditors could have avoided it, having themselves received the proceeds of the checks. All these questions have been repeatedly considered by this court: *Knapp v. Lee*, 3 Pick. 452; *Dyer v. Homer*, 22 Id. 253; *Oriental Bank v. Haskins*, 3 Met.

332; 37 Am. Dec. 140; *Crowninshield v. Kittridge*, 7 Met. 520; *Brown v. Thayer*, 12 Gray, 1; *Harvey v. Varney*, 98 Mass. 118.

The instruction as given was sufficiently favorable to the defendants. It was, in substance, that if one of two parties to a transaction, fraudulent as to creditors, has transferred property to another, no consideration having been paid, he may recede from the transaction on notice to the other party, repossess himself of his property, and devote it to its proper purposes. That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties, is well settled. Thus, if the checks transferred to the defendants had been fully paid for to the plaintiffs, and the sum had gone to the plaintiffs' creditors, the transaction would have been purged of fraud, and the defendants would have had a good title thereto: *Thomas v. Goodwin*, 12 Mass. 140; *Oriental Bank v. Haskins*, 8 Met. 332; 37 Am. Dec. 140.

It would seem equally clear, that, when a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction, by reason of such participation should be able to hold the property the possession of which he had so acquired, and thus prevent it from being devoted to its legitimate uses.

Judgment on the verdict.

FRAUDULENT CONVEYANCES — WHEN FRAUDULENT GRANTOR MAY HAVE RELIEF: *Olemens v. Olemens*, 28 Wis. 637; 9 Am. Rep. 520.

FRAUDULENT GRANTEE IS SUBSTITUTED TO RIGHTS OF HIS GRANTOR in the property conveyed, which is subject only to the latter's creditors, and it is the right of the fraudulent grantee to demand that such creditors shall pursue strictly the procedure provided by law for the enforcement of their claims: *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587; and see *Loos v. Wilkinson*, 118 N. Y. 485; 10 Am. St. Rep. 495.

FRAUDULENT CONVEYANCE. — It seems difficult to reconcile the principal case with the current of authority on the same subject. There is no doubt that, as a general rule, a fraudulent conveyance or contract is valid between the parties thereto, and that neither can urge his fraud as a means or ground of escape from his own solemn deed or act: *Davis v. Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Gary v. Jacobson*, 55 Miss. 204; 30 Am. Rep. 514, and note; *Sickman v. Lapeley*, 13 Serg. & R. 224; 15 Am. Dec. 596; *Powell v. Inman*, 8 Jones, 436; 82 Am. Dec. 426, and note; *Moore v. Jordan*, 65 Miss. 229; 7 Am. St. Rep. 641; *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587. The principal case does not deny the existence or merit of the general rule, but it permits a grantor to repent his evil doings, and in the interest of his creditors, to make such repentance effective by recovering for their benefit that

of which he had sought to deprive them by a fraudulent transfer to another. In all cases where a fraudulent transfer is valid and enforceable between or against the original parties, it is also valid and enforceable against their heirs: *Battle v. Street*, 85 Tenn. 282; and also against their executors and administrators, except in so far as the latter are representing the creditors of decedents: *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578.

FRAUDULENT CONVEYANCES. — Fraudulent grantees with notice of the fraudulent intent of their fraudulent grantors cannot hold title as against the grantor's defrauded creditors: *Eigenbrun v. Smith*, 98 N. C. 207; *Redhead v. Pratt*, 72 Iowa, 99; *Perry v. Hardison*, 99 N. C. 21; *Davis v. McCarthy*, 40 Kan. 18; *Stitz v. Keith*, 85 Ala. 465.

BRIGGS v. UNION STREET RAILWAY COMPANY.

[148 MASSACHUSETTS, 72.]

NEGLIGENCE IN ATTEMPTING TO GET ON HORSE-CAR IN MOTION, WHEN QUESTION FOR JURY. — Questions whether plaintiff was negligent in attempting to get on a horse-car while in motion, and in seizing the rail of the rear dasher and trying to pull himself up to the car, after having lost his hold on the rail attached to the body of the car, are for the jury, where the evidence showed that the plaintiff, a man sixty-eight years old, weighing nearly two hundred pounds, signaled to the driver to stop, and when the car had slowed up and was going at the rate of about four miles an hour, grasped the forward rail of the rear platform with his right hand and the rear rail on the dasher with his left, and made a spring to get on, but his foot struck on the edge of the step and slipped off, and the car starting up, he lost his grasp on the forward rail, after making several ineffectual attempts to get on the car, and holding to the dasher rail tried to keep up with the car, when he was thrown down and injured.

FAILURE TO SIGNAL DRIVER TO STOP. — It is not negligence, as a matter of law, to attempt to get on a horse-car going at the rate of about four miles an hour, even if it be known that the driver had not seen the signal to stop.

TORT by George A. Briggs against the Union Street Railway Company to recover damages for personal injuries sustained by the plaintiff in attempting to get on one of the defendant's horse-cars while in motion. There was a verdict for the plaintiff, and the defendant alleged exceptions. The facts are sufficiently stated in the opinion.

E. L. Barney, for the plaintiff.

W. and C. W. Clifford, for the defendant.

KNOWLTON, J. The first question in this case is, whether there was any evidence that at the time of the accident the plaintiff was in the exercise of due care. The plaintiff's con-

duct in its relation to the accident was particularly described in his testimony, and in the absence of any disclosure which, according to generally recognized standards of judgment, plainly showed it to have been negligent, it was for the jury, and not for the judge, to say whether it was reasonably careful. Whether a person riding upon the front or rear platform of a horse-car, or getting on or off at either platform while the car is in motion, is in the exercise of due care, has repeatedly been decided to be a question of fact for a jury: *Meesel v. Lynn etc. R. R.*, 8 Allen, 234; *Maguire v. Middlesex R. R.*, 115 Mass. 239; *Murphy v. Union R'y*, 118 Id. 228; *McDonough v. Metropolitan R. R.*, 187 Id. 210.

In this case, the plaintiff testified that he was sixty-eight years old, and weighed from one hundred and ninety to two hundred pounds; that he signaled to the driver that he wanted to get on; that the car "slowed up," and while "it was going about as fast as some horses will walk, in the neighborhood of four miles an hour," he got hold of the forward rail of the rear platform with his right hand, and of the rear rail on the dasher with his left hand, and made a spring to get on, when his foot struck on the edge of the step and slipped off; that the car had started up, and was going at increased speed; and that he made two other attempts to get on, then let go the forward rail with his right hand, and held to the dasher rail with both hands, trying to keep up with the car, until he was thrown down and injured. We cannot hold, as matter of law, that the plaintiff was negligent in trying to get upon the car as he did. It was for the jury to test his conduct by their knowledge and experience, and by their judgment of what men of common prudence would be expected to do under like circumstances.

The court was also requested to instruct the jury, that if the plaintiff believed the driver had not seen his signal, his attempt to get on the car was negligence. We are of opinion that this instruction was rightly refused. The court cannot say, as matter of law, that an attempt to step upon a horse-car which has just "slowed up," and is moving no faster than this is said to have been, is negligence, even if no signal is known to have been given to the driver. Both questions raised by these requests are covered by the decision in *McDonough v. Metropolitan R. R.*, *supra*, a case which was fully considered, and the facts of which were very similar to those of the case at bar.

The only remaining exception relates to the conduct of the plaintiff in seizing the rail of the rear dasher, and trying to pull himself up to the car, after having lost his hold upon the rail attached to the body of the car. But this was apparently a sudden and perhaps almost involuntary effort of the plaintiff to protect himself, after his foot had slipped off the step, and he was in immediate danger of falling. He testified that it all happened very quickly, and that the car stopped within fifteen or twenty feet from the place where he first grasped the rail. One should not be held too strictly for a hasty attempt to avert a suddenly impending danger, even though his effort is ill-judged. This part of the plaintiff's conduct was rightly submitted to the jury.

Exceptions overruled.

NEGLIGENCE. — ATTEMPT TO ENTER MOVING CAR IS NOT, PER SE, CONTRIBUTORY NEGLIGENCE, irrespective of the rate of speed at which it is moving. All the circumstances must be taken into consideration: *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387. But one who, in the full possession of his faculties, and with nothing to disturb his judgment, attempts to board a train then moving at from four to six miles an hour, will be adjudged, as a matter of law, guilty of such want of ordinary care as will preclude a recovery for injuries by him sustained, although the conductor of the train told him to "jump on, if he was going": *Hunter v. Coopers-town etc. R. R. Co.*, 112 N. Y. 371; 8 Am. St. Rep. 752; but compare note 757, 758.

IT IS NEGLIGENT FOR PASSENGER TO JUMP FROM RAILROAD TRAIN moving from six to twelve miles an hour, although the conductor advised him that it was safe: *Bardwell v. Mobile etc. R. R. Co.*, 63 Miss. 574; 56 Am. Rep. 842, and see note 843-846.

MARSLAND v. MURRAY.

[146 MASSACHUSETTS, 91.]

CIRCUMSTANTIAL EVIDENCE OF PERSONAL INJURY — VERDICT WHEN WARRANTED BY EVIDENCE. — Jury is warranted in finding that injury was caused by a kick of the defendant's horse, where, in an action to recover damages for injuries alleged to have been sustained by the plaintiff, a boy between four and five years of age, from a kick of the defendant's horse, the evidence showed that the horse was unharnessed and unattended on the highway near the house of the plaintiff's father, that screams were heard, and the plaintiff was first seen lying back of the horse's heels and afterwards near the horse, and that the wound was such as might have been caused by the kick of a horse.

NEGLIGENCE OF PARENT IMPUTED TO CHILD, WHEN QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE OF CHILD. — Question whether mother of infant plaintiff exercised due care to prevent him from escaping from the

house and going alone upon the highway, is properly left to the jury, who, if they find that he was on the highway without fault, might also find that he was not guilty of contributory negligence, where, in an action to recover damages for injuries sustained by the plaintiff, a boy between four and five years of age, from a kick of the defendant's horse, there was evidence that the plaintiff was under the care of his mother, and that while she was nursing a baby, he walked into another room, and after he had been absent a minute or two, she ran to the door and saw him returning from the highway covered with blood.

TORT by John W. Marsland, aged between four and five years, against Raymond Murray, to recover damages for personal injuries alleged to have been sustained from a kick of the defendant's horse. There was evidence to the effect that the plaintiff's parents lived about fifty yards from the defendant's premises. About three quarters of an hour before the accident, the defendant's horse was seen on the highway unharnessed and unattended. Screams were heard, and the plaintiff was seen lying back of the horse's heels, and afterwards near the horse, running away from him towards the house, screaming and covered with blood. There was also evidence that the defendant had said that he never knew his horse to kick any one before. The plaintiff's father testified that he left the plaintiff at home with his wife and some other persons, and was gone from his house but a short time, five minutes, and when he returned the plaintiff had been injured. The mother testified that she saw the plaintiff a few minutes before the injury; that he was in the front room, and had been in the house nearly all the afternoon; that he ran out for a few moments and came right back; that she did not let him go out; and that she was nursing a baby, and the plaintiff walked into the back room, and was gone only a minute or two, when she ran to the door and saw him covered with blood. Two physicians, who attended the plaintiff shortly after the injury, testified that the wound was such as might have been caused by the kick of a horse, or by a horse-shoe in a person's hand. The judge declined to rule, at the request of the defendant, that upon the evidence the plaintiff could not recover, but submitted the case to the jury. The jury returned a verdict for the plaintiff, and the defendant excepted.

M. Reed, for the plaintiff.

T. F. McDonough, for the defendant.

C. ALLEN, J. It is not contended, in behalf of the defendant, in the argument, that he was free from negligence in per

mitting his horse to be unharnessed and unattended upon the highway: See *Barnes v. Chapin*, 4 Allen, 444; 81 Am. Dec. 710; *Lyons v. Merrick*, 105 Mass. 71; *Goodman v. Gay*, 15 Pa. St. 188; 53 Am. Dec. 589. But he contends that there was no sufficient evidence to show that the plaintiff's injury was received from a kick of the horse, or that the plaintiff was himself in the exercise of due care; and these are the only questions we have to consider.

1. The evidence, if believed, was ample to warrant the jury in finding that the injury was caused by a kick of the horse.

2. It is true that a plaintiff cannot recover in an action like this, where there is nothing to show whether he was careful or negligent: *Crafts v. Boston*, 109 Mass. 519. But, as was said in *Mayo v. Boston etc. R. R. Co.*, 104 Id. 187, the question of due care on the part of the plaintiff presents itself in two aspects,—one being whether it was consistent with due care that he was in the place of danger; the other, whether, being in such a place, he used reasonable precautions against danger. And in the case of an injury to a young child like the plaintiff, the question becomes chiefly one of due care on the part of the person having charge of the child in allowing it to be in the place where the injury was received: *Gibbons v. Williams*, 135 Mass. 333. The fact that a very young child is allowed to be upon a much-used highway in a city, unattended, is *prima facie*, but not conclusive, evidence of negligence on the part of the person in charge: *Gibbons v. Williams*, 135 Id. 333; *Wright v. Malden and Melrose R. R. Co.*, 4 Allen, 283.

In the present case, the plaintiff was between four and five years old. The situation of the highway, the amount of its use, and the situation of the house in respect to the highway, are not disclosed. The plaintiff appears to have been under the care of his mother, who testified that she saw him a few minutes before the injury; that he was in the front room at the time; that he had been in the house nearly all the afternoon until then; that he ran out for a few moments, and came right back; that she did not let him go out; and that she was nursing a baby, and the plaintiff walked into the back room, and was gone only a minute or two, when she ran to the door and saw him covered with blood. The father also testified that he left the plaintiff at home with his wife and some other persons, was gone from his house but a short time, five minutes, and that when he returned the plaintiff had been injured. Upon this evidence, we cannot say, as matter of law,

that the mother did not exercise due care to prevent the child from escaping from the house, and going alone upon the highway; and this question was properly left to the jury.

If the child was upon the highway without any want of due care on the part of his mother, it would be rather difficult to suppose any act by him while there which would not be consistent with such care as children of that age are accustomed to use. It was only necessary for him to exercise such discretion as he had: *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Carter v. Towne*, 98 Mass. 567; 96 Am. Dec. 682. This rule has been applied in cases where children have been bitten by dogs, which, if left undisturbed, would probably not have injured the children: *Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645. It was not necessary for the plaintiff to introduce affirmative testimony to show what he was doing at the moment of receiving the injury: *Mayo v. Boston etc. R. R. Co.*, 104 Mass. 137. The horse was improperly in the highway; that is admitted. And if the jury found that the plaintiff was there without fault, they might also properly find that there was no contributory negligence on his part which should prevent his recovery.

Exceptions overruled.

NEGLIGENCE—IMPUTATION OF NEGLIGENCE OF PARENT TO CHILD: *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751, and note 754; *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; *Collins v. South Boston R. R. Co.*, 142 Mass. 301; 56 Am. Rep. 675.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WHEN AND WHEN NOT QUESTIONS OF FACT FOR THE JURY: See *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87, and note; *Village of J. v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136, and note; *Connolly v. Knickerbocker etc. Co.*, 114 N. Y. 104; 11 Am. St. Rep. 617, and note; *Durbin v. Oregon etc. R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and note.

PATTERSON v. HEMENWAY.

[148 MASSACHUSETTS, 94.]

NEGLECT AND UNAUTHORIZED USE OF ELEVATOR, AS DEFENDING ACTION FOR INJURIES SUSTAINED BY FALLING DOWN UNGUARDED ELEVATOR-WELL. — Verdict for defendants is properly ordered in an action brought by a boy to recover damages for injuries sustained by him by falling down an unguarded elevator-well, where the plaintiff, in going to rooms in the upper story of a building, made use of a freight elevator, plainly not designed for passengers, and which he had repeatedly used before, without invitation and contrary to orders, and on reaching the rooms

he stepped off the elevator, closing the door leading from the well, and on finishing his errand, went back to the door in a great hurry, opened it, and, without looking, stepped into the well, and fell, the elevator having in the mean time been lowered, as he knew it might be, by simply pulling a rope below.

TORT by George L. Patterson, a minor, to recover damages for personal injuries sustained by falling down an unguarded elevator-well in a building on Sudbury Street, in Boston, brought against Charles P. Hemenway, the lessee, and others, who were the owners of the building. The elevator consisted of a platform, attached by means of posts to a crossbeam, to which the hoisting-rope was attached, and which bore the inscription: "This elevator is for freight only, not for passengers." The evidence, upon which a verdict was ordered for the defendants, is sufficiently set forth in the opinion. The plaintiff alleged exceptions.

L. M. Child, for the plaintiff.

N. Morse and G. W. Estabrook, for the defendants.

KNOWLTON, J. The burden of proof was upon the plaintiff to show that he was in the exercise of due care at the time of the accident for which he seeks to recover. He was attempting to use an elevator in going to and from the premises of the Kimball Manufacturing Company, which were in the upper story of a building on Sudbury Street, in Boston. The entrance to the elevator at the lower story was from a passageway, having a gate, which was regularly kept locked, except during the hours from morning until sunset of each day. The mode of construction of the elevator, as well as the sign upon it, plainly indicated that it was not designed for use by passengers. The plaintiff, when going upon errands to the rooms of the Kimball Manufacturing Company, had repeatedly used it without invitation, and, on two occasions, persons connected with that company had told him not to go upon it.

It is difficult to see what evidence there was that he was in the exercise of proper care in attempting to get upon it at all on the day of the accident. But even if he might have used it without thereby being deemed guilty of negligence, it was his duty, while using it, to take reasonable precautions for his safety. And it is undisputed that he had never found any one at the elevator who operated it, that there was nobody there when he went upon it on the day of the accident, that

he went into the rooms of the Kimball Manufacturing Company, and closed the door leading from the elevator-well, and left the elevator, and that he knew that any one wanting to use it had only to take hold of the rope which operated it and pull it down to either of the floors below. After transacting his business, which took five minutes, he went in a great hurry to the door that shut off the elevator-well, opened it, heard some one speak to him, turned around quickly towards the person speaking, and, without looking at the elevator-well, stepped out into it. The elevator in the mean time had been lowered, as he knew it might be, and he fell and was injured.

His act, as he described it, was one which the general judgment of common men would immediately condemn as negligent; and there was no phase or element of it, nor any circumstance attending it, which indicated the use by him of ordinary care: *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295; 141 Mass. 335; *Taylor v. Carew Mfg. Co.*, 140 Id. 150; 143 Id. 470. Upon this ground, the jury were rightly directed to return a verdict for the defendants, and it is unnecessary to consider the questions arising upon the allegations that the defendants were negligent.

The exceptions saved by the plaintiff in relation to the introduction of testimony are also immaterial. None of the evidence to which they relate pertains to the point upon which our decision rests.

Exceptions overruled.

CONTRIBUTORY NEGLIGENCE, when insufficient to defeat recovery: *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note 882. 883. Where the plaintiff's own evidence shows that he brought the injury on himself by his own carelessness, he may be nonsuited: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and see note 637.

OWNER OF PROPERTY IS UNDER NO OBLIGATION to keep it in condition which will insure the safety of persons who go upon it without his license or invitation: *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284; 59 Am. Rep. 16, and see note 23-28; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555, and note 562-567.

ACTION FOR INJURIES SUSTAINED BY FALLING DOWN ELEVATOR-WELL. — Plaintiff not guilty of contributory negligence: *Hayward v. Miller*, 94 Ill. 349; 34 Am. Rep. 229.

RESPONSIBILITY OF ONE WHO OPERATES ELEVATOR IN LIFTING PERSONS is, according to the recent case of *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep., the same as that of a carrier by stage-coach or railway. Though not an insurer of the safety of the persons, he is bound to the utmost care and diligence of very cautious persons, and is responsible for the slightest neglect.

GRIFFIN v. BOSTON AND ALBANY R. R. Co.

[148 MASSACHUSETTS, 142.]

MASTER, AS GENERAL RULE, IS BOUND TO EXERCISE REASONABLE CARE IN PROVIDING SUITABLE MACHINERY, instruments, means, and appliances for his work; and he is responsible if he fails to do so, and an injury results to his servant, although the negligence of a fellow-servant contributed to the accident. Per C. Allen, J.

SERVANT MUST SHOW THAT INJURY IS MORE NATURALLY TO BE ATTRIBUTED TO MASTER'S NEGLIGENCE than to any other cause, in an action by him against the master to recover damages for an injury sustained by the master's failure to provide suitable machinery, instruments, means, and appliances. Per C. Allen, J.

MASTER AND SERVANT — INJURY TO SERVANT — QUESTIONS OF NEGLIGENCE FOR JURY. — Plaintiff is entitled to go to jury both on the question of the defendant's negligence and on the intestate's exercise of due care, where, in an action against a railroad company for causing the death of plaintiff's intestate, the plaintiff offered to prove that the intestate, in the discharge of his duties as a night watchman at one of the defendant's stations, while crossing the tracks at night when the station was filled with the noise and smoke of moving trains and the lights were in bad condition, after he had supposed a train had passed him, was run over and killed by the rear portion of the train which had become detached by reason of the spreading of a coupling-link, and was moving rapidly and silently, without signals, and with no one in charge.

TORT by Michael J. Griffin, as administrator of the estate of Bartholomew Griffin, against the Boston and Albany Railroad Company to recover damages for causing the death of plaintiff's intestate. The plaintiff offered to prove that the intestate was employed by the defendant as a night watchman at its passenger station, in Springfield, his duties being, among other things, to look out for people crossing the tracks, and see that they were not injured by passing trains; that in this station there were three tracks, running east and west; that about eleven o'clock at night, on June 9, 1886, two trains entered the station, a freight train going west on the middle track, and another train going east on the south track; that the train going east left considerable smoke behind it, and the lights being flickering and in a bad condition, the station was left darker than usual; that the train going east had passed, and the intestate, supposing that the train going west had also passed him, started to cross over from the south side to the north side of the station, but the rear portion of the west bound train had become detached by reason of the spreading of a coupling-link, and was moving along rapidly and quietly, without lights or signals, and with no one in charge of it; that there was at the time a great noise in the

station caused by the trains; and that the detached portion of the train struck the intestate, and passed over him, causing injuries of which he died a short time afterwards. At the close of the plaintiff's offer of proof, the judge ruled, at the request of the defendant, which offered no evidence, that the action could not be maintained, and ordered a verdict for the defendant. The case was reported for the determination of this court. If the ruling was correct, judgment for the defendant was to be entered upon the verdict; but otherwise, the case was to stand for trial.

W. H. Brooks and J. B. Carroll, for the plaintiff.

G. M. Stearns, for the defendant.

C. ALLEN, J. The two things to be considered are, whether in view of the plaintiff's offer of proof he was entitled to go to the jury upon the questions of the want of due care on the part of the defendant, and of the exercise of due care on the part of the plaintiff's intestate; and both of these matters must be determined upon the assumption that the plaintiff proved his case according to his offer, and that the defendant offered nothing by way of explanation.

1. Upon the question whether there was enough evidence of a want of due care on the part of the defendant, the difficulty is not so much in the ascertainment of the general rules as in their application. There is no doubt that as a general rule a master is bound to exercise reasonable care in providing suitable machinery, instruments, means, and appliances for his work. It is also well settled, that if he has failed to do so, and an injury has resulted to his servant, the master is responsible, although the negligence of a fellow-servant contributed to the accident: *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Boston etc. R. R.*, 73 N. Y. 38; 29 Am. Rep. 97; *Cone v. Delaware etc. R. R.*, 81 N. Y. 206; 37 Am. Rep. 491; *Grand Trunk R'y v. Cummings*, 106 U. S. 700. It is also clear that the plaintiff must introduce evidence to show that the injury is more naturally to be attributed to the negligence of the defendant than to any other cause. If the accident appears upon the evidence to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail, and the case should not be left to the jury: *Kendall v. Boston*, 118 Mass. 234; 19 Am. Rep. 446; *Wakelin v. London etc. R'y*, L. R. 12 App. C.

41; *Scott v. London and St. Katherine Docks Co.*, 3 Hurl. & C. 594; *Cotton v. Wood*, 8 Com. B., N. S., 566; *Hammack v. White*, 11 Id. 587.

In the present case, upon the plaintiff's offer of proof, it is obviously possible that the injury may have sprung either wholly or partly from the defendant's negligence, or from some cause independent of any negligence for which the defendant would be responsible to the plaintiff. But a plaintiff in a civil case is not required to prove his case beyond a doubt. All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause. No general rule can be laid down, that the mere occurrence of an accident is or is not sufficient *prima facie* proof of actionable negligence, for each case must depend upon its own circumstances; and what would be sufficient proof of such negligence in an action brought against a railroad company by a passenger, or by a stranger, might not be so in an action brought by one of its servants. The question is, whether this plaintiff upon his offer of proof was entitled to go to the jury upon the question of the defendant's negligence.

The general rule as to the defendant's duty in providing means and instruments for the operation of its railroad has been already stated. Clearly, the providing of a sufficient quantity of suitable links for coupling the cars of a train fell within this duty. This is a duty which belonged to the defendant as master, and could not be delegated. If through a want of reasonable care and diligence unsafe coupling-links were furnished, even though this were done by agents of the railroad company, the neglect is to be treated as the neglect of the company itself. Now it is true that the defendant may have used due care, although the particular coupling-link which spread or opened, and thereby led to the accident, proved to be unsuitable or unsafe. There may have been a latent defect which was undiscoverable. The link in question may have come with a car from another railroad, so that the defendant's duty was merely one of inspection, and the defendant may have done its duty in this respect. Or, in other particulars, the fault may have been the fault of a fellow-servant, for whose negligence the defendant would not be responsible to the plaintiff.

It may have been that the defendant could have exonerated

itself fully from liability. But what we have to consider is, whether under the circumstances the plaintiff went far enough with his offer of proof to put the defendant upon its defense,—far enough to make out a *prima facie* case; and in considering this question, it is impossible not to take into view the knowledge which the plaintiff and the defendant respectively possessed or had the means of obtaining. The history of this broken link is not disclosed,—whether it was new or old, whether originally sufficient or insufficient, worn or not worn, whether it was furnished by the defendant itself as a part of its own equipment, or whether it came from some other railroad. These facts it is reasonable to assume were not within the plaintiff's knowledge, or means of knowledge. The railroad train was under the management of the defendant. The defendant knew, or had the means of knowing, where and by whom the train was made up, of what cars it was composed, and what degree of care and diligence had been observed in making it safe to be run.

The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily, such separation would not happen if the link was sound and suitable for use. If the link was not sound and suitable for use, the fact of its being used in that condition properly calls for explanation from the defendant; and if under such circumstances the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant. Primarily in such case one may properly look to the railroad company itself, whose duty it is to use reasonable care to provide safe instruments and means for operating the railroad. In the absence of any explanation by the company, it is more probable that the separation of the train was from a cause for which it would be responsible than that it was from a cause for which it would not be responsible: See *Scott v. London and St. Katherine Docks Co.*, 3 Hurl. & C. 594; *Bridges v. North London R'y*, L. R. 6 Q. B. 377, by Channell, B. We think, on the whole, that the plaintiff was entitled to go to the jury upon this point.

2. The remaining question is, whether the plaintiff's intestate himself appeared to be in the exercise of sufficient

care, and upon this question also the court is of the opinion that upon the offer of proof it would be for the jury. The approaching train had become separated into two parts, from an unusual cause, and no notice had reached the intestate that it had become thus separated. A jury might find it consistent with the exercise of due care on his part to assume, when the first portion of the train had gone by, that the whole train had passed: *Maguire v. Fitchburg R. R. Co.*, 146 Mass. 379.

Case to stand for trial.

MASTER IS BOUND TO USE ORDINARY CARE IN SUPPLYING AND MAINTAINING PROPER INSTRUMENTALITIES for the performance of the work required, and generally to provide for the safety of his servant in the course of the employment to the best of his skill and judgment: *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and cases collected in note 835.

NEGLIGENCE, WHEN PROPERLY QUESTION FOR JURY: *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804, and note 812; *Marsland v. Murray*, 148 Mass. 94; *ante*, p. 520, and note.

WACHUSETT NATIONAL BANK v. FAIRBROTHER.

[148 MASSACHUSETTS, 181.]

RESIDENCE OF INDORSER OF NEGOTIABLE PAPER AT WHICH NOTICE OF DISHONOR MAY BE GIVEN is not necessarily a permanent, exclusive, or actual abode, but may be a temporary, partial, or even constructive residence.

NOTICE OF NON-PAYMENT OF PROMISSORY NOTE — RESIDENCE OF INDORSER FOR PURPOSE OF MAILING NOTICE. — Notice of non-payment of promissory note is properly sent to indorser, as at her best place of residence, under the following circumstances: The indorser, after having lived abroad, returned with her husband to her mother's house in F., her early home, where they remained for several months, during which time the note was indorsed. She and her husband then left F. for the purpose of going to his home in England, with no intention of returning, and proceeded to the seashore for their child's health before sailing, leaving behind part of their baggage, ready to be sent to the steamship. The child died at the seashore several weeks afterwards, on a Sunday, and they returned to F. on the next day to bury it. The funeral took place from the mother's house on the following Wednesday, the party in the mean time sleeping there, and taking their meals at the house of a notary next door, when, with the notary's knowledge, they went to the house of another friend, where they stayed until Friday. The note matured on Wednesday, on which day the notary protested it for non-payment, and on the next morning he sent by mail a notice thereof, directed to the indorser at her mother's house in F., at which place she received it while there on Friday for a temporary purpose, prior to returning to the seashore.

CONTRACT on certain promissory notes made by the Snow Cattle Company, and indorsed by the defendant, Mrs. Anstis

R. M. Fairbrother. Mrs. Fairbrother alone defended. The question was as to the sufficiency of the notice to charge Mrs. Fairbrother as indorser. It appeared that the defendant's early home was at 82 Blossom Street, in Fitchburg, Massachusetts, where her mother, sister, and the latter's husband continued to reside. In 1885, the defendant went to New Zealand, where she married her present husband, who was an English clergyman, living there as a missionary. She and her husband subsequently left New Zealand, having sold their furniture, and shipped their household linen to England. They arrived at Fitchburg September 21, 1886, and went to her mother's house, where a child was born to them in November, 1886, and where they remained until June 16, 1887, paying their share of the household expenses. The notes in question were indorsed by the defendant on February 21, 1887, while thus living at her mother's house. There was also evidence that in June, 1887, the defendant and her husband arranged to go to England, to his home, with no intention of returning to Fitchburg or to this country to live, and that they accordingly packed their baggage. On June 16th they left Fitchburg, and went with the rest of the family to a cottage at Martha's Vineyard, for their child's health, before sailing, leaving behind a portion of their baggage, ready to be sent to the steamship. They postponed their time of sailing to August 25th, and procured tickets for that date. On Sunday, August 21st, their child died, and on the next day the entire party returned to Fitchburg, for the sole object of burying the child. The funeral took place from the house of the defendant's mother on the following Wednesday, the party in the mean time sleeping there, and taking their meals, by invitation, at the house of a notary next door. The notary and his wife had visited the cottage at Martha's Vineyard, and knew of the intention of the defendant and her husband to go to England. After the funeral, the defendant and her husband accepted an invitation from a Mr. Kimball to pass the rest of their stay in Fitchburg with him. The notes matured on Wednesday, and were protested for non-payment by the notary on the evening of that day, and on the next morning he sent, by mail, notices thereof directed to the defendant at her mother's house. On Friday, the defendant and her husband went to her mother's house to get a portmanteau, and while there she obtained the letter containing the notices. On Saturday, the defendant and her husband returned to Martha's Vineyard, from whence

they returned to her mother's house in Fitchburg about September 15, 1887, and remained there until the latter part of November, 1887, when they went to England. The judge ruled that the notice was sufficient to charge the defendant as indorser, and ordered a verdict for the plaintiff. The defendant alleged exceptions.

T. G. Kent and H. C. Hartwell, for the plaintiff.

W. S. B. Hopkins, for the defendant.

C. ALLEN, J. Prior to the statute of 1871, chapter 239, now embodied in the Public Statutes, chapter 77, section 16, the holder of a note could not give notice of its dishonor through the mail to an indorser who lived in the same city or town, but must give the notice to him personally, or at his place of business or residence. The chief object of the statute was to extend the privilege of giving notice by mail to cases where the parties live in the same place. But in ascertaining the residence of a person to be notified, the same rules are applicable under the statute as would have been applicable prior to the statute, in case the holder of the notes had lived in Worcester and the indorser in Fitchburg. The statute did not undertake to give a new definition of "residence," nor to change the rules of law already established as to what should be sufficient to constitute a residence for the purpose of giving or receiving notice in such cases.

Residence is not a word of uniform significance, but is used in different senses. Residence for the purpose of taxation implies more permanency of abode than residence for the purpose of notice of the dishonor of a note: See *Lee v. City of Boston*, 2 Gray, 484, 490; *Borland v. City of Boston*, 132 Mass. 89, 93, 95; 42 Am. Rep. 424. We have only to consider what constitutes a residence for the latter purpose.

It is well settled that there may be a residence sufficient for this purpose, although the person has his home elsewhere: *Chouteau v. Webster*, 6 Met. 1; 39 Am. Dec. 705; *Young v. Durgin*, 15 Gray, 264. There may, indeed, be a sufficient residence without actually living in the place at all, as where one is accustomed to receive his letters at a post-office in another town from that in which he lives. Notice sent to him at his usual post-office address is considered to be a notice to him at his residence: *Chouteau v. Webster*, 6 Met. 1, 6, 7; 39 Am. Dec. 705; *Bliss v. Nichols*, 12 Allen, 443, 445; *Shelburne Falls National Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep.

445; *Bank of Columbia v. Lawrence*, 1 Pet. 578. And if one is accustomed to resort to several different post-offices, neither of which is in the town where he lives, it has been considered that a notice addressed to him at either one will be good: *Bank of United States v. Carneal*, 2 Pet. 543; *Cabot Bank v. Russell*, 4 Gray, 167; Story on Notes, sec. 343.

So, also, one may have two residences at the same time, notice to him at either of which will be good; as if one is living alternately at two places during the year, going frequently from one to the other: Story on Notes, sec. 343. And it has often been held that an abandoned residence may be considered as still subsisting, if no new residence has been established, and if the holder of the note does not know of the change: *Bliss v. Nichols*, 12 Allen, 443; *Importers' and Traders' National Bank v. Shaw*, 144 Mass. 421; *Bank of Utica v. Phillips*, 3 Wend. 408; *Saco National Bank v. Sanborn*, 63 Me. 340; 18 Am. Rep. 224. And if it is known that an indorser has abandoned his residence, and if upon reasonable inquiry the place of present residence cannot be ascertained, no notice at all need be given: *Blakely v. Grant*, 6 Mass. 385; Story on Notes, sec. 316.

From these and other authorities which might be cited, it abundantly appears that the word "residence," in the law of negotiable instruments, is not used in a strict sense as necessarily implying a permanent, exclusive, or actual abode in the place, but it may be satisfied by a temporary, partial, or even constructive residence. The law does not require of the holder of a note the highest and strictest degree of diligence in giving notice, but only such a degree of reasonable diligence as will ordinarily bring home notice to the party: *Bank of United States v. Hatch*, 6 Pet. 250, 257. Less diligence is required in ascertaining the residence for the purpose of giving notice than for the purpose of making a demand of payment: *Young v. Durgin*, 15 Gray, 264.

Applying these general views to the case at bar, we are satisfied, in the first place, that the defendant had a sufficient residence to entitle the holder of the notes to give notice of their dishonor to her through the mail. It may be conceived that, in a given case, a person might remain so transiently in different places that no one of them could be called his residence, and that no notice, except a personal one, could be given to him; but such is not this case.

We are, then, to consider where the defendant's residence was on the day of her child's burial, and on the succeeding

day. The defendant has stated the facts in the bill of exceptions as she contended that the facts were. Some of them were controverted by the plaintiff, but in this inquiry she is entitled to the benefit of having it assumed that they actually were as she contended that they might be found to be by a jury. And looking at them even in this manner, we are unable to see that the notice of dishonor could as properly have been sent to her at any other place as where it was sent. She certainly had gained no residence in England. Her brief and casual visit to Mr. Kimball's gave her no residence in his house; her counsel so concedes and contends. She probably had a sufficient residence in Martha's Vineyard while she was actually there; but she gained no domicile, and had no intention of making a permanent residence there. She went there for a temporary purpose, having no intention of returning to Fitchburg, because she intended to go to England; but this plan was broken up for the time by the sickness and death of her child. There was nothing to show that Martha's Vineyard was to be deemed her residence, except while she was personally there. When she returned to Fitchburg, it was not as to a new or strange place, but it was the place of her early and her recent home. Unless she had gained a new residence elsewhere, that would be a good residence for the purpose of notifying her of the dishonor of a note. It appears also to have been her principal and customary address for letters by mail. For the purpose of receiving notice, Fitchburg must be considered as the best residence she then had. If her residence was not there, she had no residence, and in that case, notice, if sent at all, might properly be sent to her in Fitchburg, and her proper address in Fitchburg was at 82 Blossom Street, where the notice was sent.

Exceptions overruled. —

NEGOTIABLE PAPER. — NOTICE OF DISHONOR OF NOTE IS SUFFICIENT if addressed to the indorsers at their former place of business, where these affairs were being settled, and is properly mailed if dropped into a street letter-box put up by the post-office department: *Casco National Bank v. Shaw*, 79 Me. 376; 1 Am. St. Rep. 319, and see note 321.

NOTARY NEED NOT MAKE INQUIRY AS TO THE RESIDENCE of any of the indorsers, except the last: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597, and see note 602, as to the sufficiency of notice of protest by mail.

BILL OF EXCHANGE — PRESENTMENT AT PLACE SPECIFIED. — Where the acceptor has designated the street and number where the bill is payable, it must appear, in order to charge the drawer or indorser, that presentment for payment was made at the place specified, or a sufficient excuse for not doing so must be shown: *Brown v. Jones*, 113 Ind. 46.

LEWIS v. LYNN INSTITUTION FOR SAVINGS.

[143 MASSACHUSETTS, 235.]

SAVINGS BANK — UNDERTAKING TO DEPOSITORS — APPORTIONMENT OF LOSSES AMONG DEPOSITORS. — Savings bank, incorporated under the laws of Massachusetts, undertakes to its depositors to combine and manage their deposits according to the best judgment of the trustees, and to share among them in just proportion the beneficial results, if any, of such management; but there is no absolute promise to repay to any depositor the full amount of his deposit at all events, and in case of loss, the loss must be borne *pro rata* by the depositors.

SAVINGS BANK — LOSSES SHARED EQUALLY AMONG DEPOSITORS UNDER BY-LAWS. — Losses of a savings bank in Massachusetts are, by intentment of law, to be shared equally, where it appears by its by-laws that the depositors are to stand on a basis of equality, though profits only are spoken of in terms.

SAVINGS BANK — SETTLEMENT OF ACCOUNT WITH DEPOSITOR IN CASE OF LOSS — PRESUMPTION FROM LAPSE OF TIME. — Depositor of savings bank in Massachusetts, who, with knowledge of the facts and without objection, accepts the balance remaining after a proportionate deduction is made by the trustees to meet a loss which has occurred preventing the payment of deposits in full, is bound by such settlement, and cannot afterwards recover the amount of such deduction; and after a lapse of fifty years from the time the deduction is made, the deposit withdrawn, and the account closed on the books of the bank, it will be assumed that the apportionment of the loss was just, that notice thereof was given the depositors, and that it was known to the complaining depositor when the money was paid.

CONTRACT by Arthur Lewis, as administrator of the estate of Mary Lewis, against the Lynn Institution for Savings, to recover the balance of a deposit made by the intestate with the defendant. The facts are sufficiently stated in the opinion.

J. R. Baldwin, for the plaintiff.

H. P. Moulton and J. F. Hannan, for the defendant.

C. ALLEN, J. This case is certainly quite remarkable in its facts. More than fifty years ago the defendant savings bank closed upon the books the account of a female depositor, by paying to her attorney the balance found to be due after making a deduction of five per cent for losses sustained on its investments; and the present action is brought by the administrator of her estate to recover the amount so deducted, with interest. The case calls upon us to look into the nature of the contract made by the savings bank with the depositors, under the system which then existed, and which has always prevailed in Massachusetts since savings banks began. And in

determining what the contract was, regard must be paid, not merely to the language used by the defendant in the books which it issued to its depositors, but to the circumstances under which the deposit was received, and the chartered powers and purposes of the institution itself.

The Lynn Institution for Savings was incorporated by the statute of 1826, chapter 20. Twenty-eight persons were named in the act, who, with such others as might be duly elected members, were made a corporation, with power to receive deposits, to be used and improved to the best advantage, and the income or profit thereof to be applied and divided among those making the deposits, and their executors, administrators, or assigns, in just proportion; the principal to be withdrawn at such times and in such manner as the corporation should direct and appoint; other persons might be elected members; a president and other necessary officers might be chosen; and by-laws might be made. It was also provided that the officers should lay a statement of its affairs before any persons appointed by the legislature to examine the same, whenever required to do so, and that the legislature might at any time make further regulations for the government of the institution, and alter, amend, or repeal the act of incorporation at pleasure.

At the time of granting this charter, there were no general laws in Massachusetts respecting savings banks, and but five earlier charters had been granted, viz., by the statute of 1816, chapter 92, to the Provident Institution for Savings in Boston; by the statute of 1818, chapter 64, to the Institution for Savings in Salem; by the statute of 1819, chapter 85, to the Institution for Savings in Newburyport; by the statute of 1824, chapter 95, to the Institution for Savings in Roxbury; and by the statute of 1825, chapter 4, to the New Bedford Institution for Savings. The last one alone of the earlier charters contained similar provisions to that of the defendant, reserving the right of alteration, amendment, or repeal.

The first general legislation concerning savings banks was the statute of 1834, chapter 190, which was incorporated, with some additions, into the Revised Statutes, chapter 36, sections 71-84. This legislation provided that every such corporation might receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose, to a limited amount; prescribed the manner of investing the deposits; required that the income or profits of all deposits should be

divided among the depositors, or their legal representatives, in just proportions, with a deduction of all reasonable expenses incurred in the management thereof; and provided that the principal deposits might be withdrawn at such time or in such manner as the corporation should in its by-laws direct. In the Revised Statutes, provision was also made for an annual return to the secretary of the commonwealth, by each institution, showing its condition. By the statute of 1851, chapter 127, a board of bank commissioners was established, with power, amongst other things, to visit and examine savings banks, and in case of need, to apply to this court for an injunction, and for receivers, temporary or permanent.

It thus appears that a savings bank is an incorporated agency for receiving the moneys of depositors in small or moderate amounts, and investing them merely for the use and benefit of the depositors, who are to receive the advantage thereof in just proportion. At the outset, the chief purpose was to encourage frugality by affording to persons of small means an opportunity to have their savings cared for by persons of experience, who, by combining the deposits, could make advantageous investments not available for small investors. And this purpose still exists. The corporation had no capital stock, properly so called. There was no relation of privity between successive depositors, as there is between successive stockholders in an ordinary corporation. No profit or benefit accrued to the managers. It is a matter of familiar knowledge, that in the earlier times the officers of savings banks, with the exception of the treasurer, usually received no pay for their services. It was so with the defendant. The savings-bank book, upon which the deposit now sought to be recovered is shown, states that the savings bank would be open every Wednesday from two to three o'clock, P. M., and that the trustees and other officers would superintend the business without the smallest benefit to themselves; and one of the by-laws provides that the trustees shall never receive any emolument, but may allow a reasonable compensation to a treasurer, or such other officers as may be found necessary.

Gradually, with the progress of time, a practice grew up among savings banks, which is now made compulsory by the Public Statutes, chapter 116, section 24, of reserving a guaranty fund to meet possible losses; but the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit

and security of the depositors. This idea was, and still is, the corner-stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depositors; but the latter are to share whatever profit may be made in just proportion among themselves. The corporation is a mere agency for managing the moneys of the depositors.

To others, to third persons, the corporation can incur liabilities, in contract or in tort, for which the funds in its hands will be responsible. But to the depositors themselves, the undertaking of the corporation is, that it will receive and combine the deposits, and manage and use them to the best practicable advantage, according to the judgment of the trustees, and give to the depositors in just proportion among themselves the benefit of the result of such management. There is no absolute promise to repay to any depositor the full amount of his deposit, at all events. Such a promise to one depositor would imply that in case of loss he should be repaid out of the deposits of others. But the promise or undertaking of the corporation is the same to all. There is no promise to pay one at the expense of others. The promise is, in effect, to pay each depositor in full, with his dividends, provided the assets are sufficient; and if they are not sufficient, then to pay to each one his proportionate share.

There is no legal difficulty ordinarily in maintaining an action against a savings bank to recover a deposit, because ordinarily the assets are sufficient, and the savings bank when sued has no occasion to insist on the condition. It admits that its funds are sufficient, and the plaintiff's right in other respects is all that has to be considered. But suppose a great loss has occurred, by fire, theft, defalcation, or otherwise, and the assets are reduced so that the savings bank can only pay fifty or seventy-five per cent, and the case becomes different. At present, the most convenient method under such a disaster is to seek the appointment of a receiver. But it is not conceived that this is a necessary mode of procedure, provided the officers and the depositors can agree upon a settlement between themselves.

In the present case, there was a loss, from investments lawfully and properly made in the shares of two banks; and the officers of the defendant estimated the loss at five per cent, and passed votes that the depositors would have to submit to a deduction of that percentage upon their deposits. If the

depositors were dissatisfied, it was open to them to make objection in some legal form. But they did not do so. They appear to have been satisfied with, or at least to have submitted to, the course of the trustees. And if the plaintiff's intestate, or her duly authorized attorney, accepted the balance found due, after making the deduction, as and for a settlement and payment of what she was entitled to receive upon her deposit, such acceptance, in the absence of fraud, would bind her. It would be like any settlement between principal and agent, where the agent accounts for and delivers up all the property of the principal which he has, and the principal receives it. In the present case it has been argued that a broader contract is to be found in the statements of the savings bank, contained in its book issued to the plaintiff's intestate, of what it will pay, and also in its by-laws. But these statements, when looked at in view of the nature and character of the institution, are not to be taken as promises, but rather as statements of the expectation of the managers in respect to the success of their management. These statements in the book before us are pretty broad, to be sure; but after all, taking the whole of the by-laws together, it sufficiently appears that the depositors were to stand on a basis of equality; and though profits are all that are spoken of in terms, by intendment of law losses must be shared in like proportion.

The views above expressed are supported to a greater or less extent by the decisions in the following cases: *Cogswell v. Rockingham Ten Cents Savings Bank*, 59 N. H. 43; *Hall v. Paris*, 59 Id. 71; *Simpson v. City Savings Bank*, 56 Id. 466; 22 Am. Rep. 491; *Bunnell v. Collinsville Savings Society*, 38 Conn. 203; 9 Am. Rep. 380; *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641; *In re Newark Savings Institution*, 28 N. J. Eq. 552. See also *Huntington v. Savings Bank*, 96 U. S. 388. They are opposed to the decision in *Makin v. Savings Institution*, 23 Me. 350, 41 Am. Dec. 349, with which we are unable to agree. The remark in *Reed v. Home Savings Bank*, 130 Mass. 443, 446, 39 Am. Rep. 468, that a depositor in a savings bank becomes a creditor of that bank, is correct; but there was then no occasion to consider what is now determined, namely, that the promise of the savings bank is not an absolute promise to pay in full at all events.

It is further contended by the plaintiff that it does not appear that the plaintiff's intestate or her attorney accepted the sum paid by the defendant in 1838 as a full settlement of what

she was entitled to receive. But after this lapse of time, some things are to be taken for granted. On May 18, 1838, the trustees passed the votes directing the treasurer to charge off three per cent to cover the loss sustained by the failure of the Nahant Bank, and two per cent to cover the loss sustained by the depreciation of the Oriental Bank, and these sums were immediately charged against every depositor. The sum by which the deposit of the plaintiff's intestate would be reduced by these two votes was \$15.25. That sum was charged against her on the defendant's ledger, "for loss deducted," leaving a balance due to her of \$306.25, which was marked as paid on May 21st, and two red lines were drawn underneath the figures, indicating that the account was closed. The payment of that sum was made on May 21, 1838, three days after the votes above mentioned, to an attorney at law, who acted for her and others, and who signed a receipt for the money on the books of the bank, and on the same day also signed similar receipts for two other persons. The plaintiff's intestate died in 1855. The savings-bank book was retained by her, with the payment of \$306.25 indorsed thereon, showing a balance of \$15.25 unexplained on the book.

The plaintiff made no explicit request to have the question submitted to the jury, whether Mrs. Lewis or her attorney received the payment on May 21, 1838, knowing that the trustees had voted to make the deduction from the deposits; and the ruling of the court was upon the ground that the trustees had the right thus to apportion the losses. It is now to be assumed that the apportionment was a just one, that notice thereof was given to the depositors, and that it was known to the plaintiff's intestate or her attorney when the money was paid. The court will not readily infer or assume the existence of a wrong which has not been discovered or complained of for fifty years. This being so, the payment was a settlement, and the plaintiff's intestate received all that she was in law entitled to receive.

Judgment for the defendant.

SAVINGS BANK. — IN NEW YORK, RELATION BETWEEN SAVINGS BANK AND DEPOSITOR THEREIN is that of debtor and creditor: *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; 10 Am. St. Rep. 479. Compare *People v. San Francisco Savings Union*, 72 Cal. 199.

SAVINGS BANK IS MERELY AGENT OF DEPOSITORS, and a loss met by the bank is properly apportioned *pro rata* among the depositors: *Bunnell v. Coltonville Savings Society*, 38 Conn. 203; 9 Am. Rep. 380. See *Eaves v. People's*

Savings Bank, 27 Conn. 229; 71 Am. Dec. 59; *Matter of Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 424, and note.

UPON INSOLVENCY OF SAVINGS BANK, DEPOSITOR CANNOT SET OFF his deposit against a debt due from him to the bank: *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641.

DODGE v. BOSTON AND BANGOR STEAMSHIP Co.

[148 MASSACHUSETTS, 207.]

CARRIER OF PASSENGERS — PASSENGER'S RIGHTS IN LEAVING AND RETURNING TO VEHICLE OF TRANSPORTATION AT INTERMEDIATE POINTS. —

Passenger is entitled to protection, as such, as well when leaving and returning to the vehicle of transportation at intermediate points of a journey, for a purpose naturally and ordinarily incidental to his passage, as at any other time; and therefore a passenger by steamer can properly go on shore at an intermediate point of his journey to get his breakfast, and has a passenger's right to protection during his egress from the boat for that purpose, where the steamer stopped at a wharf where there was a restaurant kept by the owner of the wharf at which passengers bound beyond, whose tickets did not entitle them to meals on the steamer, were accustomed to get breakfast, with the knowledge and without objection of the carrier.

CARRIER OF PASSENGERS IS BOUND TO EXERCISE UTMOST CARE AND DILIGENCE in providing against those injuries which human care and foresight can guard against; by which is to be understood the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business.

CARRIER OF PASSENGERS IS BOUND TO EXERCISE SAME DEGREE OF CARE TOWARDS PASSENGER IN HIS EGRESS from the vehicle of transportation for a proper purpose as when he remains thereon; and therefore, where a passenger by steamer was injured in attempting to leave the boat, an instruction that the carrier "did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer," is properly refused.

CARRIER OF PASSENGERS OWES PASSENGER NO DUTY TO PROVIDE FOR HIS SAFETY WHEN ACTING IN DISOBEDIENCE OF REASONABLE ORDERS AND REGULATIONS; and therefore, where a carrier by steamer provided a safe and convenient means of egress for passengers from the saloon deck, and a passenger was injured while attempting to land from a gang-plank on the main deck, which was intended to be used exclusively by employees and there was evidence that he was notified that passengers were to land from the saloon deck only, and was subsequently warned by the mate not to leave from the main deck, a refusal to instruct the jury that he could not recover if he received such notice and warning, unless the injury was willfully inflicted, should have been given.

TORT by William C. Dodge against the Boston and Bangor Steamship Company to recover damages for personal injuries received while attempting to land from one of the defendant's

steamers, on which the plaintiff had taken passage from Boston to Camden. The steamers were accustomed to stop on the following morning after leaving Boston at Rockland, for about an hour, for the purpose of discharging and receiving freight and passengers. Meals were regularly served on board to those passengers who had bought tickets entitling them to meals, or who chose to pay extra for them. The plaintiff's ticket did not entitle him to meals. The owner of the wharf at Rockland, where the steamers landed, kept a restaurant thereon, against the wishes and interest of the defendant, at which passengers bound beyond were accustomed to get breakfast, with the knowledge of the defendant's servants, who made no objection. On the arrival of the steamer at Rockland, the plaintiff, for the purpose of obtaining his breakfast at the restaurant on the wharf, went down from the saloon deck to the main deck, and while attempting to walk over a small plank placed from a gangway of the main deck to the slip, for the use of the defendant's employees exclusively, was struck by a heavy gang-plank, which was being moved by the deck hands, and injured. It appeared from the defendant's evidence that no provision had ever been made for discharging or receiving passengers at Rockland from the main deck, although occasionally passengers had been landed there from that deck, but that safe and convenient means of egress for passengers from the saloon deck were provided; that before reaching Rockland, a servant of the defendant went over the steamer, ringing a bell, and calling out to passengers to land from the saloon deck by the forward gangway; and that when the plaintiff was about to walk over the small plank from the main deck, he was warned by the second mate not to do so. The plaintiff denied that he had heard any notice given, or that he had received any warning. The defendant asked the court to instruct the jury: 1. That the defendant was not bound to take every possible precaution against danger; it was not an insurer of the safety of the plaintiff; it was bound to use the utmost care which was consistent with the nature and extent of the business in which it was engaged, but was bound to exercise this degree of care toward the plaintiff only so long as he remained upon or within the steamer; 2. That the defendant was bound to guard the plaintiff against all such dangers only as might naturally, and according to the usual course of things, be expected to occur, and this, too, only as long as the plaintiff remained upon or within the steamer;

3. That the plaintiff, upon the undisputed facts of the case, at the time he received the injury, was not a passenger, but was entitled to the rights and protection of a passenger only so long as he remained upon or within the steamer; 4. That the undertaking and duty of the defendant toward the plaintiff was to carry him with the highest degree of care from Boston to Camden, and only at Camden to provide him safe means to leave the steamer; 5. That the defendant was not bound to prevent plaintiff from leaving, or attempting to leave, the steamer at a place where it had not invited him to leave, or undertaken any contract to land him; 6. That if the plaintiff undertook, for his own convenience or pleasure, to leave the steamer at Rockland, an intermediate station on the trip for which he had purchased his ticket, while the steamer was temporarily at Rockland for the purpose of discharging and receiving other passengers, baggage, and freight, and without notice to any of the officers or servants of the defendant that he desired to leave the steamer at that point, and without any invitation from the officers or servants of defendant to leave the steamer at the time and in the manner in which he left it, then the defendant was under no obligation to furnish the plaintiff with safe means of egress; 7. That if the plaintiff left the defendant's steamer at a point short of his destination, without any invitation or inducement from the defendant, or its agents or servants, and solely for his own purposes and convenience, he was, after leaving the steamer, a mere trespasser upon the defendant's landing and wharf, and the only obligation upon the defendant was not to willfully injure him; 8. That if the plaintiff was warned by the agents or servants of the defendant not to leave the steamer at the forward port gangway on the main deck at or before the time at which he left it, he must be held to have taken all the risk of injury upon himself in leaving at the time and in the manner in which, and from the portion of the steamer at which, he left it, and could not recover for any injury which he may have sustained while so leaving, unless such injury was willfully inflicted; 9. That if the plaintiff was notified by the agents or servants of the defendant, at or before the time at which he left the steamer, that passengers desiring to land at Rockland were to land at or from a part of the steamer other than the forward port gangway on the main deck from which the plaintiff did actually land, the plaintiff must have taken all the risk of injury himself in leaving the steamer at the time

and manner in which, and from the portion of the steamer at which, he left it, and could not recover for any injury he may have sustained while so leaving, unless such injury was willfully inflicted. The defendant further requested the judge, in case of a refusal to give the sixth instruction, to instruct the jury,—10. That even if the plaintiff was justified in leaving the steamer at Rockland in the manner and at the time and in the portion of the steamer at which he left it, the defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer. All of these instructions were refused. There was a verdict for the plaintiff, and the defendant alleged exceptions.

W. H. Moody, for the plaintiff.

E. T. Burley and E. S. Dodge, for the defendant.

KNOWLTON, J. This case presents an important question as to the rights and duties of passengers and common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached

their destination and been put in a freight-house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time; and this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments: *Peniston v. Chicago etc. R. R.*, 34 La. Ann. 777; 44 Am. Rep. 444; *Jeffersonville etc. R. R. v. Riley*, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop, he has the rights of a passenger. Of course during the interval between his departure from the station and his return to it to resume his journey, he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for pas-

sengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also *Clussman v. Long Island R. R.*, 9 Hun, 618, affirmed in 73 N. Y. 606; *Hrebrik v. Carr*, 29 Fed. Rep. 298; *Dice v. Willamette Transportation and Locks Co.*, 8 Or. 60; 34 Am. Rep. 575. In the first of these cases, the defendant was held liable for a defect in a platform of its station to a passenger who had left a train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank, and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover.

No decision has been cited that conflicts with our views. In *State v. Grand Trunk R'y*, 58 Me. 176, 4 Am. Rep. 258, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court, in that case, was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such, and at what point he would resume his former relation.

Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff, as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers

of passengers, as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily intrusted, in a great degree, to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage-coaches, steamboats, and sailing-vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger.

In *Readhead v. Midland R'y*, L. R. 2 Q. B. 412, it is said that a "carrier of passengers for hire was bound to use the utmost care, skill, and diligence in everything that concerned the safety of passengers." In *Railroad Co. v. Aspell*, 23 Pa. St. 147, carriers of passengers are said to be responsible for "any species of negligence, however slight, which they or their agents may be guilty of." In *Warren v. Fitchburg R. R.*, 8 Allen, 227, 85 Am. Dec. 700, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train. In *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers.

Gaynor v. Old Colony etc. R'y, 100 Mass. 208, 97 Am. Dec. 96, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. Mr. Justice Colt said in the opinion: "The plaintiff was a passenger, and while that relation existed, the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection, so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings, platforms, and means of egress as in their previous transportation." See also lan-

guage of Chief Justice Shaw, in *McElroy v. Nashua etc. R. R.*, 4 Cush. 400; 50 Am. Dec. 794.

Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions, "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these, are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular, it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars: *Warren v. Fitchburg R. R.*, 8 Allen, 227; 85 Am. Dec. 700; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 315; 87 Am. Dec. 717; *Taylor v. Grand Trunk R'y*, 48 N. H. 304, 316; 2 Am. Rep. 229; *Tuller v. Talbot*, 23 Ill. 357; 76 Am. Dec. 695.

It may be assumed that the plaintiff would have ceased for the time to be a passenger, if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused. For, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in *Moreland v. Boston etc. R. R.*, 141 Mass. 31, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed, that the defendant had provided a safe and convenient

place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway, which was in fact used by the plaintiff, for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and, upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.

This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law: *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146; *Pennsylvania R. R. v. Zebe*, 33 Pa. St. 318; *McDonald v. Chicago etc. R. R.*, 26 Iowa, 124, 142; 96 Am. Dec. 114; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; 14 Am. Rep. 716. We are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if by the word "notified," in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request. No instructions were given upon this subject, and because of this error the entry must be, exceptions sustained.

COMMON CARRIERS. — PASSENGER ON RAILWAY TRAIN DOES NOT LOSE HIS CHARACTER AS SUCH BY ALIGHTING from the cars at a regular station, from motives of either business or curiosity, although he has not yet arrived at the termination of his journey. He still retains the right of being protected by the regulations which the company have provided for the safety of persons traveling on its cars and using its station-grounds, and if he is injured by the omission of the servants of the company to obey rules adopted for the pro-

tection of persons in his situation, it is liable for the injuries thus received: *Parsons v. N. Y. etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450, and note 457.

WHEN RIGHTS OF INTENDING PASSENGER AT RAILROAD STATION CEASE: *Heinle v. Boston etc. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676.

RIGHTS OF PERSON RECEIVED AS PASSENGER AND RIDING ON FREIGHT TRAIN in violation of the rules of the railroad company: *McGee v. Missouri Pac. R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note 712.

CARRIERS — INJURIES TO PERSONS. — Where plaintiff was injured while standing upon the car-platform, if he was there for the purpose of riding there, he could not recover, but if he was there a reasonable time only for the purpose of trying to secure a seat, he could recover: *Dewire v. Boston etc. R. R.*, 148 Mass. 344; but where one goes upon the platform of a station-house of a railway from mere curiosity, or for the transaction of business in no way connected with the railway company, he cannot recover against the company for injuries received by reason of defects of the platform: *St. Louis etc. R'y Co. v. Fairbairn*, 48 Ark. 491. In an action to recover for personal injuries, an instruction that, if plaintiff knowing the cars were about to start, and being unnecessarily upon the platform of the car, was thrown off and injured by the starting of the engine with no unusual jerk, he could not recover, is proper: *Torrey v. Boston etc. R. R. Co.*, 147 Mass. 412; compare *Kelly v. Manhattan etc. R'y Co.*, 112 N. Y. 443.

RAILWAYS — INJURIES TO EMPLOYEES VIOLATING COMPANY'S RULES: See *Deeds v. Chicago etc. R'y Co.*, 74 Iowa, 154; *Hannibal etc. R. R. Co. v. Kanaley*, 39 Kan. 1.

SMETHURST v. PROPRIETORS OF INDEPENDENT CONGREGATIONAL CHURCH IN BARTON SQUARE.

[148 MASSACHUSETTS, 261.]

NEGLIGENCE — FALL OF SNOW FROM ROOF OF BUILDING OF NO UNUSUAL CONSTRUCTION. — One who constructs a building so near the street that ice or snow will so fall from it, in the ordinary course of things, as to endanger travelers therein, is liable for injuries thereby caused, although the building is of no unusual construction.

NEGLIGENCE — FALL OF SNOW FROM ROOF PROJECTING OVER INTO STREET. — One who constructs a building with eaves projecting over into the street, so as to endanger travelers therein by ice or snow falling from the roof, is liable in an action for negligence for injuries thereby caused, although the construction of the building was also distinctly wrongful.

NEGLIGENCE — FALL OF SNOW FROM ROOF — PROXIMATE CAUSE. — Negligence of defendant is the proximate cause of the injuries to the plaintiff, where through such negligence snow falls from the roof of defendant's building striking plaintiff's horse, causing it to start, and throwing plaintiff from the wagon to which the horse was attached.

HIGHWAYS — WHO HAVE RIGHTS OF TRAVELERS. — One who is unloading a wagon in a street in a reasonable and proper manner is to be considered as a traveler, so as to entitle him to recover for injuries caused by snow falling from a building.

PRACTICE — BILL OF EXCEPTIONS WHICH DOES NOT SHOW EVIDENCE EXCLUDED. — Bill of exceptions stating that questions to a witness were excluded, but not showing what the answers would have been, or what was expected to be proved by the witness, presents no error for review.

TORT by Edward B. Smethurst against the proprietors of Independent Congregational Church in Barton Square, to recover damages for personal injuries. The declaration alleged that, through the carelessness and negligence of the defendant, a large quantity of snow fell from the roof of a church building in Salem, owned by the defendant, upon the plaintiff's horse, while the plaintiff was unloading his wagon in the street, causing the horse to run and to throw the plaintiff to the ground, greatly injuring him. It appeared, at the trial, that the eaves of the church building in question projected over into the street about two feet from the wall of the building, the distance down the slope of the roof from a line directly above the wall being two feet seven inches. There was a snow-guard on the roof, directly above the line of the wall, sufficient to keep back the snow on the roof above it, but it did not appear that there was anything to retain the snow which collected below the guard. The plaintiff was engaged with a horse and wagon in conveying boxes into the church building from the street, and while standing on the floor of the wagon, the horse gave a sudden start, owing to the fall upon his hind quarters of a quantity of snow from the roof, throwing the plaintiff to the ground, and causing the injuries. One Pinnock, a slate-roofer, was asked as an expert by the defendant how far the snow below the guard would fall from the building, what were the kinds of guards in use, and what precautions other than those which were taken could have been taken to prevent the fall of snow from the roof. These questions were excluded, and the defendant excepted. The defendant requested the judge to instruct the jury: 1. That under the pleadings the plaintiff could recover only upon satisfactory proof that his injuries were caused by the defendant's negligence, 2. That the plaintiff could recover only in case his injuries, according to the usual experience of mankind, might reasonably have been anticipated as the natural and probable result under ordinary circumstances of negligence shown on the part of the defendant, and likely to follow therefrom; 3. That there was no evidence from which the jury could find that the plaintiff was using the highway as a traveler at the time of the injury; and if not so using the highway, he could have no greater

or other rights than if the place where he was had not been within the limits of the highway; 4. That there was no evidence upon which the jury could find a verdict for the plaintiff. The judge declined to instruct the jury as requested, but instructed them: 1. That the defendant had no right to erect or maintain a building, if it be of no unusual construction, so near the street that snow or ice would fall from it in the ordinary course of things while collecting there and thawing, so as to endanger travelers who were passing, and it would not avail the defendant to show that the building was of no unusual construction, or even constructed better than buildings usually were to prevent snow from falling into the street, provided it did not in fact prevent the snow and ice from falling into the street; 2. That the striking of the horse by the snow, if it caused him to start, would be a direct proximate cause of the injury, although the ice or snow might not have hit the plaintiff; 3. That a party had the right to use a highway to travel upon with horse or carriage, or to go on foot, or for the transportation of merchandise, provided he used it in a reasonable manner and what was a reasonable manner was a question of fact for the jury under all the circumstances of the case. The plaintiff had a verdict, and the defendant alleged exceptions.

S. A. Fuller, for the plaintiff.

W. H. Gove, for the defendant.

DEVENS, J. It is the contention of the defendant, that, as the declaration alleges negligence on the part of the defendant, the plaintiff can maintain it only by showing a want of ordinary care in the construction or management of its building.

When parties in the management of their own estates so use them that injury in the ordinary course of things may fairly be expected to result to others in the enjoyment of their estates, or in the exercise of their lawful rights, as such use is wrongful, if injury does thus result, it may properly be said to have occurred by their negligence. The instructions as given on this point were in the language used by this court in *Shipley v. Fifty Associates*, 103 Mass. 194; 8 Am. Rep. 318. They deny to the defendant the right to erect and maintain a building, even if of no unusual construction, so near the street that ice or snow will so fall from it in the ordinary course of

things as to endanger travelers who are passing in the highway, or using the same rightfully for the purpose of travel. *Shipley v. Fifty Associates, supra*, like the case at bar, was an action brought for negligence on the part of the defendants in the use of their property. It is there said that the defendant "has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed."

The defendant urges, that as in that case the building of the defendant did not encroach upon the highway, while in the case at bar it is shown to have done so, the eaves projecting about two feet beyond the wall of the building and into the street, the injury to the plaintiff did not result from its carelessness or negligence, but from the encroachment over the highway, and thus, even if the defendant would be liable for a nuisance or in trespass, it is not liable in this action. The wall of the defendant's building was on the line of the highway; but the portion of the roof projecting over the highway was a part of the roof as the building was constructed and maintained, and if injury resulted therefrom, it was incidental to the construction and use by the defendant of its property. Nor was such use the less properly described as careless and negligent because it was also distinctly wrongful.

The second instruction requested by the defendant was a general statement, taken from *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768, the accuracy of which we have no occasion to question. If that given by the presiding judge instead of it was correct, adapted to the case, and all that the case required, the defendant can have no ground of objection because the words asked by him were not used. The instruction as given was: "The striking of the horse by the snow, if it caused him to start, would be a direct proximate cause of the injury, although the ice or snow may not have hit the plaintiff." This instruction assumes that the fall of ice or snow upon the horse was found to have been due to the negligence of the defendant, as upon all parts of the case not especially made the subject of exception, full and appropriate instructions were given.

It is well settled in this commonwealth that one who violates a duty owed to others, or commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experi-

ence, are likely to, and in fact do, result from his act: *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Metallic Compression Casting Co. v. Fitchburg R. R.*, 109 Id. 277; 12 Am. Rep. 689; *Derry v. Flitner*, 118 Mass. 181. That a horse struck by falling ice or snow would start, and would thus be liable to injure a person standing near or upon the wagon, and who was engaged in loading or unloading, is so entirely according to the natural and usual sequence of events that it cannot have been necessary to submit the question whether one occurrence might probably be expected to follow the other.

The defendant further contends that the plaintiff was not using the street as a traveler, and therefore had not the rights which a traveler or an adjoining proprietor might have to be protected from the effects of a fall of snow. The plaintiff, at the time of the accident, was engaged in unloading from his team goods which were to be deposited in the basement of the defendant's building. The exact position of the plaintiff's team was in dispute. The presiding judge declined to instruct the jury that the plaintiff was not a traveler, and instructed the jury that the plaintiff had the right to use the way for the transportation of goods in a proper manner, not unreasonably obstructing or interfering with others, adding "He has a right to stop in the road for the purpose of getting out or getting in, or of unloading a team in a reasonable manner; and what is a reasonable manner is a question of fact for the jury to pass upon under all the circumstances of the case." Under this instruction, the jury must have found that he was unloading his team in a reasonable and proper manner when the accident occurred.

A traveler lawfully using the way has the same rights to enjoy such use undisturbed as if he were the owner in fee-simple: *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318. In order to be a traveler, it is not necessary that one should be constantly moving, if he is a pedestrian, or that the vehicle he drives or that in which he is conveying goods, if he is using one, shall be continuously in motion. It would certainly be impossible to use the highways conveniently for the ordinary purposes of business or social life, with teams or lighter carriages, if occasional stops were not permitted to enable those using them to load and unload teams, to receive and deliver goods, to enter shops and stores, and to make brief calls of business, or even of a social char-

acter. During these stops, if reasonable in duration, one should not lose his rights as a traveler, and the protection thus afforded to his person or property: *O'Linda v. Lothrop*, 21 Pick. 292; 32 Am. Dec. 261; *Judd v. Fargo*, 107 Mass. 264.

In regard to the exclusion of the questions to the witness Pinnock, it is sufficient to say that it does not appear by the bill of exceptions what his answers would have been, or what the defendant offered to prove by him, if he were allowed to answer. It has been often decided in such cases that the bill of exceptions must contain enough to show that the excepting party has been actually injured: *Warren v. Spencer Water Co.*, 143 Mass. 155, 164.

Exceptions overruled.

NEGLIGENCE—DANGEROUS WALLS AND ADJACENT BUILDINGS: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note 40.

HIGHWAYS—TEMPORARY OBSTRUCTION OF STREET: *Callanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 831, and note 840-844.

PRACTICE—BILL OF EXCEPTIONS, WHAT TO CONTAIN: *Bloss v. Plymale*, 3 W. Va. 393; 100 Am. Dec. 752; *Pomroy v. Parmlee*, 9 Iowa, 140; 74 Am. Dec. 328; *Sewell v. Eaton*, 6 Wis. 490; 70 Am. Dec. 471; *Hackett v. King*, 3 Allen, 144; 85 Am. Dec. 695, and note 696.

NEGLIGENCE—SNOW AND ICE ON ROOFS.—Where a roof is so constructed as to cast snow and ice down upon the street, the owner is liable for injuries produced thereby: *Lawson's Rights and Remedies*, sec. 1161; *Shipley v. Fifty Associates*, 106 Mass. 194; 8 Am. Rep. 318; *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76, and note 78. Compare *Lawson's Rights and Remedies*, sec. 1160, as to other objects falling upon travelers upon streets; *Kirby v. Boylston etc. Ass'n*, 14 Gray, 249; 74 Am. Dec. 682.

GURLEY v. ARMSTEAD.

[143 MASSACHUSETTS, 267.]

COMMON CARRIER IS NOT LIABLE TO OWNER OF GOODS FOR THEIR CONVERSION by transporting them in good faith from their place of deposit under the direction of a person in apparent control of them, and capable of immediately taking them into his actual custody, and delivering them to such person at another place.

TORT by Margaret P. Gurley against Edmund Armstead for the conversion of certain articles of personal property belonging to the plaintiff. The facts, which were agreed upon, are stated in the opinion.

B. B. Jones, for the plaintiff.

W. H. Moody, for the defendant.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it, except those of the plaintiff. In all that he did, the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself, nor denying title to any other, nor exercising any act of ownership, except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them: *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner: *Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could

appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances: *Buckland v. Adams Express Co.*, 97 Mass. 124; *Judson v. Western R. R.*, 6 Allen, 486; 83 Am. Dec. 646. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant, upon well-established authority, would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it, and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.

COMMON CARRIERS — To WHOM CARRIERS MAY LAWFULLY DELIVER PROPERTY: *Weyand v. Atchison etc. R. R. Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504, and note 511-514; *Wolfe v. Missouri Pac. R'y Co.*, 97 Mo. 473; 10 Am. St. Rep. 331. The wrongful delivery of property by a carrier is a conversion for which trover will lie: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301.

OLD COLONY RAILROAD v. SLAVENS.

[148 MASSACHUSETTS, 303.]

NEGLIGENCE — JOINT TORT-FEASORS — LIABILITY OF ONE THROUGH WHOSE NEGLIGENCE INJURY WAS CAUSED, TO INDEMNIFY ANOTHER WHO HAS BEEN COMPELLED TO ANSWER THEREFOR. — Railroad company against which a judgment has been recovered by one who sustained personal injuries through the obstruction of a sidewalk at its station by mail-bags, is not a joint wrong-doer with mail-carriers who negligently caused the obstruction, in such a sense as to prevent a recovery by it from such carriers of the amount of the judgment paid.

TORT by the Old Colony Railroad Company, against H. C. Slavens and another, to recover the amount of a judgment obtained against the plaintiff by one George W. Amory. The plaintiff was a common carrier of passengers, and carried the United States mails to and from Boston. The defendants had a contract with the government to carry the mails from the plaintiff's station in Boston to the post-office. On November 17, 1885, one of the defendants' employees took a number of mail-bags from an arriving train, and left them on the sidewalk or platform of the station in such a manner that Amory fell over them and was injured. Amory brought action against the plaintiff to recover damages for the injuries sustained because of the obstructed sidewalk, and obtained judgment, which the plaintiff paid. The plaintiff thereupon instituted this action against the defendants to recover the amount of the judgment so obtained. No regulations concerning the taking of the mails from the trains had been made by the plaintiff, except that it had given general instructions to the railway clerk, who had communicated them to the defendants' servants, not to take the mails until the passengers from incoming trains had passed by. The defendants requested the judge to instruct the jury: 1. That if the injury was caused by the sole default of the plaintiff, or by the joint fault of the plaintiff and any of the defendants, the plaintiff could not recover; 2. That if the plaintiff authorized, licensed, or permitted the making of the obstruction which caused the injury, it could not recover; 3. That if the plaintiff authorized, licensed, or permitted the defendants, or any of them, to handle the mail-bags in the way in which they were handled at the time of the injury, and such handling made an obstruction of the sidewalk which caused such injury, such authority, license, or permission made the plaintiff a joint wrong-doer, even if the defendants were at fault, and it could not recover

against any of them; 4. That if the plaintiff had the right to designate the place where and the manner in which, the mail-bags should be taken from the trains and conveyed to the mail-wagon, and at the time of the injury they were so taken and conveyed in the way and manner in which they were, with the knowledge of the plaintiff and without its objection, and such way and manner of conveying them caused or contributed to the injury, then the jury may find that the plaintiff authorized and permitted the obstruction by which the injury was caused, and if the jury so found, the plaintiff could not recover; 5. That if the plaintiff maintained the sidewalk as a means of egress for its passengers to the highway, and knew, or had reason to know, that the reasonable and convenient way of conveying the mail-bags from its train to the mail-wagon made an obstruction of the sidewalk to its passengers, and it stood by and permitted the same without objection, it was negligent as to its passengers lawfully using the sidewalk, and could not recover. The judge refused to give the instructions requested, but ruled that if the plaintiff made such arrangement, regulation, or provision for the unloading of the mails by the defendants' servants that by the use of ordinary care they could not avoid obstructing the sidewalk, and if at the time of the injury the servants had used reasonable care as to the time and manner of transferring the mails, then the plaintiff would be so far responsible for the injury as not to be entitled to recover of the defendants; but if the defendants' servants, under such arrangement and regulation, by the use of ordinary care in unloading the mails, could have avoided obstructing the sidewalk at the time of the injury, the plaintiff might recover, even though the officers, agents, and servants of the plaintiff might have known of previous instances of similar obstructions by the defendants' servants, and made no objection thereto. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. H. Benton, Jr., for the plaintiff.

L. G. Blair, for the defendants.

C. ALLEN, J. The verdict establishes it as a fact, that the defendants might have done the work of transferring and loading the mail-bags without obstructing the sidewalk as it was obstructed on the occasion of the injury to Amory. The plaintiff's regulations and provisions did not require such obstruction, and the only question before us is, whether, assum-

ing this as a fact, the plaintiff was entitled to recover. And we think the plaintiff and the defendants were not, as to each other, *in pari delicto*. The plaintiff was held liable to Amory because bound to keep the sidewalk reasonably safe. But the ground of the present action is, that the defendants by their negligent act exposed the plaintiff to this liability. The plaintiff's neglect to keep the sidewalk safe did not make the plaintiff a joint wrong-doer with the defendants in any such sense as to prevent the plaintiff from recovering: *Inhabitants of Milford v. Holbrook*, 9 Allen, 17, 23; 85 Am. Dec. 735; *Inhabitants of West Boylston v. Mason*, 102 Mass. 341; *Inhabitants of Woburn v. Boston etc. R. R. Co.*, 109 Id. 283; *Gray v. Boston Gas Light Co.*, 114 Id. 149; 19 Am. Rep. 324; *Churchill v. Holt*, 181 Mass. 67; 41 Am. Rep. 191; 127 Mass. 165.

Exceptions overruled.

CONTRIBUTION BETWEEN WRONG-DOERS: *Armstrong County v. Clarion County*, 66 Pa. St. 218; 5 Am. Rep. 368; *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105. Where parties are not *in pari delicto*, and one is compelled to pay damages, he may sue the other for contribution: *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 83.

RIDEOUT v. KNOX.

[143 MASSACHUSETTS, 868.]

USE OF ONE'S OWN PROPERTY — ERECTION OF HIGH FENCES. — One has a right at common law, it seems, to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air.

CONSTITUTIONAL LAW — POLICE POWER — ACT DECLARING HIGH FENCES PRIVATE NUISANCES. — Statute is constitutional, both as to existing and future fences and structures, which declares that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," shall be a private nuisance, and which provides that the injured adjoining owner or occupant may have an action therefor.

FENCES — ACT DECLARING HIGH FENCES PRIVATE NUISANCES — EXISTENCE OF MALEVOLENCE AS DOMINANT MOTIVE. — Malevolence must be the dominant motive in the erection or maintenance of a fence or other structure, without which it would not have been built or maintained, in order to give a right of action under a statute which declares that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," shall be a private nuisance, and which provides that the injured adjoining owner or occupant may have an action therefor.

FENCES — ACT DECLARING HIGH FENCES PRIVATE NUISANCES — EVIDENCE OF MAINTENANCE. — Assistance given by a husband in building a fence on his wife's land does not make him liable therefor, and does not tend to prove that he maintains the fence, where it was given before the passage of an act declaring that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," should be a private nuisance, and providing that the injured adjoining owner or occupant may have an action therefor.

EVIDENCE — DECLARATION OF WIFE IN HUSBAND'S ABSENCE. — Wife's declarations in her husband's absence, tending to charge the husband with a liability, are not evidence against him.

TORT by Leon Rideout, against David Knox and Elizabeth E. Knox, his wife, to recover damages against the defendants for maliciously erecting and maintaining, for the purpose of annoying the plaintiff, a fence on a lot of land, belonging to Mrs. Knox, on Johnson Street, in the city of Lynn, adjoining a lot owned by the plaintiff. The action was brought under chapter 348 of the statute of 1887, which provided as follows: "Section 1. Any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance. Section 2. Any such owner or occupant, injured either in his comfort or enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby, and the provisions of chapter 180 of the Public Statutes, concerning actions for private nuisances, shall be applicable thereto." The fence, a structure about seventy-five feet long and eleven feet high, composed of slats set into posts, was erected in November, 1886, by the order of Mrs. Knox, on her land, against the fence which stood on the line dividing the lots of the parties. The cost of the material and labor therefor was paid by Mr. Knox, who was also present when the structure was being erected, and gave directions to the workmen. Knox testified that the structure was erected as a trellis on which to trail vines, and not for the purpose of injuring the plaintiff in the comfort or enjoyment of his property. Mrs. Knox, when notified and requested by the plaintiff to remove the structure, after the act of the legislature took effect, replied that she would have nothing to say about it, as she left it all to her husband. The defendants requested the judge to rule: 1. That the act was unconstitutional; 2. That the structure must have been erected for the sole purpose of annoyance; and even if a motive to annoy existed, if it was inferior to a

motive of use or adornment of the defendants' estate, and if there was a *bona fide* use of the structure, beneficial to the defendants, the plaintiff could not recover; 3. That the action must be discontinued as to David Knox, there being no title in him to the premises on which the structure was erected. The judge, however, ruled that the statute was constitutional. And, as to the second request, the judge, after instructing the jury that the plaintiff must prove that the structure was maliciously maintained for the purpose of annoying the plaintiff, and that "annoying" meant "injuring" the plaintiff, either in his comfort or in the enjoyment of his estate, charged that if the sole purpose for which the structure was put up was as a trellis on which to train vines, the plaintiff could not recover; but if the defendants had in mind in maintaining the structure, or if it was their intention in maintaining it, not only to use it for the purpose of training vines, but also for the purpose of injuring the plaintiff, either in his comfort or in the enjoyment of his estate, then the plaintiff had made out that part of his case. As to the third request, the judge instructed the jury that if a person does or directs the doing of an act which could not be done at all without constituting and creating a nuisance, he was personally responsible, whether acting for himself, or for the benefit of another. The jury returned a verdict for the plaintiff for one cent, and the defendants alleged exceptions.

W. H. Niles and G. J. Carr, for the plaintiff.

J. R. Baldwin, for the defendants.

HOLMES, J. This is an action of tort, under the statute of 1887, chapter 348. The plaintiff has had a verdict for nominal damages, and the first question raised by the bill of exceptions is the constitutionality of the statute. Another question, more or less connected with the former, is, whether the structure, in order to bring it within the act, must be erected or maintained for the purpose of annoyance as the dominant motive, or whether it is enough if that purpose existed, although subordinate to a *bona fide* use for legitimate purposes.

At common law, a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only: *Walker v. Cronin*, 107 Mass. 555, 564; *Chatfield v. Wilson*, 28

Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Frazier v. Brown*, 12 Ohio St. 294; Martin, B., in *Rawstron v. Taylor*, 11 Ex. 369, 378, 384. See *Benjamin v. Wheeler*, 8 Gray, 409, 413.

But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities, that, even at common law, the extent of a man's rights, in cases like the present, might depend upon the motive with which he acted: *Greenleaf v. Francis*, 18 Pick. 117, 121, 122; see *Carson v. Western R. R.*, 8 Gray, 423, 424; *Roath v. Driscoll*, 20 Conn. 533, 544; 52 Am. Dec. 352; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Swett v. Cutts*, 50 N. H. 439, 447; 9 Am. Rep. 276.

We do not so understand the common law; and we concede further, that, to a large extent, the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation. It may be assumed that, under our constitution, the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree; most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain: *Sawyer v. Davis*, 136 Mass. 239, 243; 49 Am. Rep. 27.

The statute is confined to fences, and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is not denied, when any convenience of

the owner would be served by building higher. It is at least doubtful whether the act applies to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief: *Commonwealth v. Walden*, 3 Cush. 558. See *Commonwealth v. Goodwin*, 122 Mass. 19, 35.

Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive,—a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently.

We are of opinion that the statute, thus construed, is within the limits of the police power, and is constitutional, so far as it regulates the subsequent erection of fences. To that extent, it simply restrains a noxious use of the owner's premises, and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go: See *Commonwealth v. Alger*, 7 Cush. 53, 86, 96; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694; *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 59 Am. Rep. 113. See also *Talbot v. Hudson*, 16 Gray, 417, 423.

Whether the statute is constitutional with reference to fences already in existence when the act was passed, is a more difficult question. We are compelled to construe the act as applying to all fences maintained after it goes into operation. If a fence which was built before the act, and is simply allowed to stand, may be found to be a nuisance, and abated at the expense of the owner, there is a taking of property without com-

compensation which is more marked and significant than in the case of a simple prohibition to build: *Commonwealth v. Alger*, 7 Cush. 53, 103. But the case is not so hard as it seems. If the owner of the fence gave leave to the party complaining to take it down, it would show conclusively that the fence was no longer maintained by him for malevolent motives, and therefore would defeat an action for subsequent annoyance. On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided, the *quasi* accidental character of the defendant's right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are of opinion that the act is constitutional to the full extent of its provisions: See *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 Id. 1.

We are of opinion, however, that the exceptions must be sustained on the ground that the construction of the statute embraced in the second request for a ruling was substantially correct, as we have stated, whereas it appears that the request was refused, and the jury were instructed otherwise.

This fence was built before the act of 1887 was passed. The statute could not make the conduct of David Knox, in 1886, unlawful retrospectively. Help given by him in lawfully building the fence on his wife's land did not of itself make him liable, whatever his motives, and did not tend to prove that he maintained the fence. There was no evidence that he did so, unless it is to be found in the ambiguous statement that he used it, which does not seem to have been the ground on which the case was allowed to go to the jury. The reply of Mrs. Knox in his absence was not evidence against him. As the exceptions must be sustained upon another ground, it is unnecessary to say more on this branch of the case.

Exceptions sustained.

CONSTITUTIONAL LAW. — LEGISLATURE MAY, SUBJECT TO CONSTITUTIONAL LIMITATIONS, prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public and of others to use their property: *State v. Yeff*, 97 N. C. 477; 2 Am. St. Rep. 305, and note 310; *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893.

PRIVATE DWELLING-HOUSE MAY NOT BE DECLARED NUISANCE BY AUTHORITY OF LEGISLATURE, simply because it may injure adjoining property by cutting off the breeze from and the view of the sea: *Quintini v. Board of Aldermen*, 64 Miss. 483; 60 Am. Rep. 62.

ERECTION UPON ONE'S OWN LAND EXCLUDING LIGHT AND AIR FROM NEIGHBOR: See *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570.

EVIDENCE — ADMISSIONS OR DECLARATIONS BY HUSBAND OR WIFE AS EVIDENCE AGAINST THE OTHER: *May v. Sturdevant*, 75 Iowa, 116; 9 Am. St. Rep. 463, and note 467; *Johnson v. Boice*, 40 La. Ann. 273; 8 Am. St. Rep. 528; *Spitz's Appeal*, 58 Conn. 184; 7 Am. St. Rep. 303.

In *Smith v. Moree*, 148 Mass. 407, the principal case was followed on the point that the Massachusetts statute of 1887, chapter 348, applied to existing structures subsequently maintained, and was constitutional.

COMMONWEALTH v. PLAISTED.

[148 MASSACHUSETTS, 375.]

MUNICIPAL CORPORATIONS — BOARD OF POLICE — REGULATION OF ITINERANT MUSICIANS. — Board of police of the city of Boston have the power, under the statutes of the state and ordinances of the city, to adopt rules regulating and restraining itinerant musicians in the streets and public places of the city.

MUNICIPAL CORPORATIONS — REGULATION OF ITINERANT MUSICIANS — SALVATION ARMY. — One who plays a musical instrument in the streets of a city, as a participant in a procession or parade of the Salvation Army, is an "itinerant musician" within the meaning of a rule of the board of police thereof requiring the taking out of a license by such persons.

CONSTITUTIONAL LAW — REGULATION BY MUNICIPAL CORPORATION OF ITINERANT MUSICIANS — RELIGIOUS WORSHIP OF SALVATION ARMY. — One who plays a musical instrument in the streets of a city, in violation of a rule of the board of police thereof, is not protected from the consequences of such violation by the fact that his act was done as a matter of religious worship only, as a participant in a procession or parade of the Salvation Army; and it is immaterial that there was no actual disturbance or breach of the peace on the particular occasion.

MUNICIPAL CORPORATIONS. — POWER CONFERRED ON BOARD OF POLICE TO "REGULATE" INCLUDES POWER TO REQUIRE REASONABLE LICENSE FEE. Power conferred on board of police of a city to "regulate" itinerant musicians includes the power of requiring the taking out of a reasonable license fee.

MUNICIPAL CORPORATIONS — NOTICE OF RULES OF BOARD OF POLICE UNNECESSARY. — Rule of board of police regulating itinerant musicians is binding without notice.

CONSTITUTIONAL LAW — DELEGATION BY LEGISLATURE OF POLICE POWER TO PARTICULAR BOARD OF OFFICERS OF CITY. — Legislature may delegate the power to regulate the use of streets and public places to a board of police of the city.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATION — SELF-GOVERNMENT — QUALIFICATIONS OF OFFICERS. — Massachusetts statutes of 1885, chapter 323, creating a board of police for the city of Boston, whose members are to be appointed by the governor, with the advice and consent of the council, from the two principal political parties, is not unconstitutional because it takes from the city the power of self-government in matters of internal police, or because it fixes the qualifications of members of the board.

COMPLAINT against George Plaisted, charging him with having performed on a cornet in a public street of the city of Boston, without having been licensed by the board of police, contrary to its rules and regulations. The defendant, on the evening of the day alleged, was on Washington Street, a public street of the city, taking part in a procession or parade of the Salvation Army, and was engaged in playing upon a cornet. The procession was without police escort. There was no disturbance or breach of the peace. The board of police of the city was established under the statute of 1885, chapter 323, the first section of which provided that "the governor of the commonwealth, with the advice and consent of the council, shall appoint from the two principal political parties three citizens of Boston, who shall have been residents therein two years immediately preceding the date of their appointment, who shall constitute a board of police for said city, and who shall be sworn before entering upon the duties of their office"; and the second section provided that "the board of police shall have authority to appoint and establish and organize the police of said city of Boston, and make all needful rules and regulations for its efficiency. All the powers now vested in the board of police commissioners in said city of Boston, by the statutes of the commonwealth, or by the ordinances, by-laws, rules, and regulations of said city, except as otherwise hereby provided, are hereby conferred upon and vested in said board of police." On September 27, 1887, the board of police adopted certain rules and regulations, under which the defendant was arrested, "for the government of itinerant musicians," the first of which provided that "no person shall sing or play or perform on any musical instrument in the streets or public places of the city of Boston, except in connection with a funeral, a military parade, or a procession of a political, civic, or charitable organization for which a police escort is provided, unless licensed thereto by the board of police for the city of Boston, as hereinafter set forth." A penalty was provided for the violation of any of the rules. There was no evidence that these rules had ever been published, or that the defendant had any notice of them. The defendant offered to show that the organization called the Salvation Army is a regular religious and charitable organization, with a set form of worship; that the street parade is a part of that worship; that the parade in which the defendant played the cornet was one of these parades; and that the defendant took part in the parade as a

matter of religious worship only; but the judge excluded the evidence. The judge also refused to give a number of instructions at the request of the defendant, the questions arising under which appear from the opinion, but instructed the jury, against the defendant's objection, that if they were satisfied beyond a reasonable doubt that the defendant played the cornet, they would be warranted in finding the defendant guilty. The jury returned a verdict of guilty. It was agreed that if there was error in the exclusion of the evidence, or in the rulings or refusal to rule, the verdict should be set aside; otherwise it was to stand.

H. C. Bliss, assistant attorney-general, for the commonwealth.

G. A. A. Pevey, for the defendant.

MORTON, C. J. The defendant contends that the rules of the board of police, which he is charged with having violated, are not within the terms of the authority conferred upon that board. But we think this ground of objection cannot be maintained. The statute of 1885, chapter 323, section 2, conferred upon and vested in the board of police all the power theretofore vested in the board of police commissioners, except as otherwise therein provided. The statute of 1878, chapter 244, established the board of police commissioners, and in section 2, after mentioning other powers, proceeded to enact that "said board may also be empowered by the city council to exercise all or any of the powers conferred by the statute of the commonwealth upon the board of aldermen, the city council, or the city of Boston, in relation to licensing, regulating, and restraining theatrical exhibitions, . . . itinerant musicians," etc. By the Public Statutes, chapter 53, section 16, "the mayor and aldermen of a city may adopt rules and orders not inconsistent with law for the regulation and control of persons who frequent the streets and public places therein playing on hand-organs or other musical instruments, beating drums, blowing trumpets, . . . with penalties for the violation thereof, not exceeding twenty dollars for each offense." This enactment was derived from the statute of 1875, chapter 136, section 2, which in its turn was founded on the statute of 1869, chapter 301, section 2. The words "mayor and aldermen" in the statute above quoted, when applied to Boston, mean "board of aldermen": Gen. Stats., c. 19, sec. 17.

It has been suggested that the Public Statutes, chapter 53, section 16, were not designed to be applicable to the city of

Boston; but we see no reason for excluding Boston from this salutary provision, and we have no doubt that under the various statutes cited, the board of police may be empowered to regulate and restrain itinerant musicians to the same extent that the board of police commissioners might have been. By the revised ordinances of 1885 of the city of Boston, chapter 26, section 1, it was provided that "the board of police shall have and exercise all the powers conferred by the statutes of the commonwealth and the ordinances of the city upon the board of aldermen, or upon the mayor and aldermen, in relation to licensing, regulating, and restraining . . . itinerant musicians." It thus appears that the board of police, according to the terms of the statutes and ordinances, have the authority to adopt rules for regulating and restraining itinerant musicians in the streets and public places of Boston.

It is objected that the defendant was not an itinerant musician within the meaning of the rule of the board of police. But the general phrase, "itinerant musician," includes the defendant; and the exceptions contained in the rule are sufficient to show that no other exception can fairly be implied, which would take him out of its operation.

It is also objected that the defendant's act of playing the cornet in the parade in the street was done as a matter of religious worship only. But this defense cannot avail to protect him from the consequences of an act which is made subject to a penalty under the law: *Reynolds v. United States*, 98 U. S. 145, 161; *State v. White*, 64 N. H. 48. The provisions of the constitution which are relied on, securing freedom of religious worship, were not designed to prevent the adoption of reasonable rules and regulations for the use of streets and public places; and a religious body, however earnest and sincere, cannot avail itself of these provisions as an authority to take possession of a street in a city, in violation of such rules, for the purpose of public worship therein. The fact that there is no actual disturbance or breach of the peace on the particular occasion is immaterial: *State v. White, supra*.

It is further urged by the defendant that the rules are unreasonable and invalid; that under the guise of regulating they virtually prohibit; and that the power of requiring the taking out of a license, and paying a license fee, is not included in the power of regulation. It is, however, to be borne in mind that these rules do not restrict any one in the ordinary use of his own property, but merely affect the use which

may be made of the streets and public places of the city. Nor is the reasonableness of the rules to be tested by their possible application to extreme cases, as, for instance, singing or playing (in a low tone not intended to be heard by others) for a short time in a street or place not occupied by dwellings. No police rules or regulations are to be tested in this manner, and if such a case were to present itself, perhaps the rule might by construction not be deemed to include it. However that may be, we are to look at the rule more generally.

The validity of rules and regulations quite as broad and sweeping as this, in reference to the use of streets in cities, has often been upheld: *Commonwealth v. Worcester*, 3 Pick. 461; *Vandine, Petitioner*, 6 Id. 187; 17 Am. Dec. 351; *Pedrick v. Bailey*, 12 Gray, 161; *Commonwealth v. Bean*, 14 Id. 52; *Commonwealth v. Curtis*, 9 Allen, 266; *Commonwealth v. McCafferty*, 145 Mass. 384. Under a power to regulate, the requirement to take out a license is free from legal objection: *Commonwealth v. Stodder*, 2 Cush. 562, 573; 48 Am. Dec. 679; *Vandine, Petitioner*, 6 Pick. 187; 17 Am. Dec. 351; *Nightingale, Petitioner*, 11 Pick. 168; *Pedrick v. Bailey*, 12 Gray, 161; *Commonwealth v. Brooks*, 109 Mass. 355. And where a license is lawfully required, a small fee may be imposed, not designed for revenue, but to cover reasonable expenses incident to the enforcement of the rules: *Commonwealth v. Stodder*, 2 Cush. 562; 48 Am. Dec. 679; *Welch v. Hotchkiss*, 39 Conn. 140; Cooley's Constitutional Limitations, 3d ed., 201, note; 1 Dillon on Municipal Corporations, 3d ed., sec. 357.

The rules are binding upon all persons without notice: *Healand v. City of Lowell*, 3 Allen, 407; 81 Am. Dec. 670; *Vandine, Petitioner*, 6 Pick. 187, 189; 17 Am. Dec. 351; 1 Dillon on Municipal Corporations, 3d ed., secs. 355, 356.

The defendant contends that the power to make the rules in question could not be delegated to the board of police. The decisions cited in support of this argument (*Day v. Green*, 4 Cush. 433, *City of Lowell v. Simpson*, 10 Allen, 88, 89) are merely to the effect that, where a city ordinance gives power to the mayor and aldermen to grant a license to move a building through the streets, the aldermen cannot delegate this power to the mayor alone. No authority has been cited, and after some examination we have found none, which holds that the legislature cannot authorize a particular board of officers, who have charge of the whole or a portion of the affairs of a city, to make reasonable police rules and regulations which shall

be binding upon the people, with penalties imposed for a violation of them.

It could not at this day be contended that such power cannot be intrusted by the legislature to cities and towns, or to the mayor and aldermen of a city and the selectmen of a town, as representing the municipality: *Heland v. City of Lowell*, 8 Allen, 407; 81 Am. Dec. 670; 1 Dillon on Municipal Corporations, 3d ed., sec. 308. And in this commonwealth it has long been the custom to vest similar powers in boards of health of cities and towns, and such delegation of authority has always been recognized as valid: Stats. 1816, c. 44, sec. 3; R. S., c. 21, secs. 1, 5, 6; Gen. Stats., c. 26, secs. 1, 5; Pub. Stats., c. 80, secs. 1, 4, 8, 18; *Taunton v. Taylor*, 116 Mass. 254, 260; *Sawyer v. State Board of Health*, 125 Id. 182, 196; *Commonwealth v. Young*, 135 Id. 526. Similar power was also, in 1860, given to the cattle commissioners: Stats. 1860, c. 221, secs. 2, 6, 10; Pub. Stats., c. 90, secs. 13, 16, 19. In the present case, as has already been seen, the legislature authorizes the city council to empower the board of police to make rules and regulations, and a majority of the court is of opinion that there is no constitutional objection to this delegation of authority: Cooley's Constitutional Limitations, 3d ed., 118, 204; *Brooklyn v. Breslin*, 57 N. Y. 591; *Birdsall v. Clark*, 73 Id. 73; 29 Am. Rep. 105; *State v. Paterson*, 34 N. J. L. 163.

The case of *In re Frazee*, 63 Mich. 396, is no authority against this view. In that case, the city council, without having any legislative authority, assumed to pass a by-law prohibiting, under a severe penalty, acts similar to those done by the defendant, and the court held it to be beyond the power of the city council to do so.

It is also suggested, though not much insisted on, that the statute of 1885, chapter 323, is unconstitutional, because it takes from the city the power of self-government in matters of internal police. We find no provision of the constitution with which it conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the constitution. While the constitution recognizes our system of town governments as an inherent part of our general system of government, so that the legislature could not abolish the town system without coming in conflict with some parts of its provisions, yet in most respects it leaves the power and duty

of providing laws for the government of the towns and cities in the discretion of the legislature.

It gives to the general court the very broad and sweeping powers "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth; the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits of the several civil and military officers of this commonwealth": Const., c. 1, sec. 1, art. 4. The second article of amendment of the constitution provides that "the general court shall have full power and authority to erect and constitute municipal or city governments in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution, as the general court shall deem necessary or expedient for the regulation and government thereof": Const. Amend., art. 2. Under these provisions, as is said by Chief Justice Chapman, "there can be no doubt that the power to create, change, and destroy municipal corporations is in the legislature. This power has been so long and so frequently exercised upon counties, towns, and school districts, in dividing them, altering their boundary lines, increasing and diminishing their powers, and in abolishing some of them, that no authorities need be cited on this point. The constitution does not establish these corporations, but vests in the legislature a general jurisdiction over the subject by its grant of power to make wholesome laws, as it shall judge to be for the general good and welfare of the commonwealth." It "may amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, and abolish them altogether, at its own discretion": *Weymouth etc. Fire District v. County Commissioners*, 108 Mass. 142.

The several towns and cities are agencies of government largely under the control of the legislature. The powers and

duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt that it has the right in its discretion to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities. We are therefore of opinion that the legislature has the right to provide that the police of Boston shall be put under the control and management of a board of police appointed by the governor; and we see nothing in the details of the statute of 1885 which is open to any constitutional objection.

The legislature has the right to fix the qualifications of the members of the board, and we see no objection to the provision that they shall be appointed from two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias. It can probably be regarded only as directory to the governor, and not as an element in the tenure of the office; in either view, it violates no provision of the constitution, and it is for the legislature to determine whether such a qualification is wise.

Judgment on the verdict.

MUNICIPAL ORDINANCE CONTAINING UNREASONABLE PROVISIONS regulating Salvation Army processions is void: *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310, and see note 319; *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175.

POLICE POWER DEFINED: *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474; 8 Am. St. Rep. 544, and see cases collected in note 549.

MUNICIPAL ORDINANCE FORBIDDING SALE OF GOODS ON SUNDAY, but excepting from its operation those keeping their business places closed on Saturday, is unconstitutional, as giving to Jews a privilege denied to others: *City of Shreveport v. Levy*, 28 La. Ann. 671; 21 Am. Rep. 553.

DENHOLM v. MCKAY.

[148 MASSACHUSETTS, 434.]

EXECUTORS OF DECEASED PARTNER—SALE BY EXECUTORS OF PARTNERSHIP ASSETS TO SURVIVING PARTNER, WHO WAS ALSO EXECUTOR—LACHES IN AVOIDING SALE. — Executors of deceased partner have no authority to make a final agreement with the surviving partner as to the price and terms at which he might take the decedent's interest in the partnership assets, where the surviving partner was one of the executors, under a partnership agreement which provided that, in the event of either partner dying, the survivor should have the option of taking the assets himself at such price and terms as might be agreed upon with the representatives of the deceased partner; and their agreement as to the value may be avoided by those interested in the estate within a reasonable time.

INFANTS INTERESTED IN ESTATE NOT AFFECTED BY CONDUCT AND DELAY OF GUARDIAN IN CALLING EXECUTORS TO ACCOUNT. — Minor children of deceased partner are not affected by such conduct and delay on the part of the widow, who was their guardian, as might bar her personally from holding the executors responsible for selling the interest of the decedent in the partnership assets to the surviving partner for less than its value; but it is their right, under the Massachusetts Public Statutes, chapter 144, section 9, to have the accounts of the executors opened to correct any errors therein.

EXECUTOR'S LIABILITY ON IMPROPER SALE OF PARTNERSHIP ASSETS. — Executors of deceased partner who sell his interest in the partnership assets to the surviving partner, who was one of the executors, believing that they had the right to do so under the partnership agreement, and have accounted for a price which they thought was reasonable, but which was, in fact, somewhat below the real value, and where the surviving partner formed, with new partners, another firm, which purchased such assets, mingled them with new assets, and sold them, will be held to account, under the circumstances, simply for the full value of the interest of the decedent at the time of the sale, with interest, instead of the amount actually accounted for.

APPEAL by Margaret M. McKay, and her two minor children, from a decree of the probate court allowing the third account of the executors of the will of William C. McKay, the husband and father of the appellants. On February 3, 1880, McKay and William A. Denholm formed a partnership in the dry-goods business at Worcester, by an agreement which provided that "if either partner shall die during the continuance of this agreement, the other party shall carry on the business in the same manner until the next stock-taking, and the survivor shall then have the option of taking the assets himself, at such price and terms as may be agreed upon by the legal representatives of the deceased and himself, or put the business into liquidation for the benefit of both parties, such liquidation to be as speedy as possible; or if agreed upon by the

survivor and the representatives of the deceased, the business may be carried on until the expiration of this agreement; provided always, that the party so carrying on the business shall at all times disclose his acts, the affairs of the firm, the books, and the account of stock to the representatives of the party so deceased." At the time this agreement of copartnership was executed, McKay had made a will, in which he appointed Denholm his sole executor. This will was afterwards revoked by another, in which Denholm was also appointed sole executor; and finally this second will was revoked by a third, under which Denholm, Robert J. McKay, and Daniel G. McKay were appointed executors. In this third and last will, the testator, after making provision for his wife and others, and for the maintenance and education of his two minor children, provided that the residue of his estate should be allowed to accumulate, and to be given equally to such children, or the survivor, on becoming twenty-five years of age. Mrs. McKay was, at the time of the probate of the will, the guardian of the children. The testator died on May 7, 1884. In accordance with the partnership agreement, Denholm continued the business until August 27th following the testator's death, when he caused an inventory to be taken of the firm assets. Appraisers were afterwards appointed by the probate court, who became satisfied that the inventory was fairly taken, and adopted it as a part of an inventory which was filed in court. The executors then assumed to sell to Denholm the interest of the estate in the partnership property for the sum appraised. Thereafter, on September 19, 1884, Denholm, Robert J. McKay, and one Hughes formed a partnership for the purpose of continuing the business which had been formerly carried on by the firm, and Denholm assumed to turn over to the new firm the interest of the estate in the old, and the assets became mingled with new assets, and were sold in the regular course of business. Denholm and the other executors intended to act fairly in relation to the taking of the inventory and the disposition of the property, and they believed that the price named in the inventory was a reasonable price; but the interest of the estate was, in fact, worth a little more than the sum at which it was appraised. Mrs. McKay was informed of the result of the taking of the inventory, and understood that it was arranged by the executors that Denholm should take the partnership property and dispose of it as his own, and should allow the estate for it at the inventory price;

and while she indicated some disappointment that her husband's entire estate inventoried less than she expected it would, she expressed confidence in Denholm, and made no objection to the proposed method of disposing of the partnership property. The first account of the executors, in which they charged themselves with the personal estate according to the inventory, and a balance was shown as remaining in their hands, was allowed without objection. The second account, which contained a charge against the executors of the balance of the former account, was also allowed, after Mrs. McKay had indorsed a request upon it that it be allowed, signed with her own name, and with her signature as guardian of each of her children, and after the probate court had appointed a guardian *ad litem*, who certified his assent. In the third account, the executors were charged with the balance of the former account. Mrs. McKay objected to its allowance, on the ground that the executors had not properly accounted for the partnership property. The executors claimed that they were chargeable with the partnership interest only at the price at which it was inventoried; while the appellants contended that the executors should be ordered to disclose what use was made of the firm property from August 27, 1884, to the date of filing the account in question, and what profits had been derived therefrom, and that they should be charged with the value of the testator's interest in the business, and with the profits thereof. It was agreed that if the executors were right, the decree should be affirmed; but otherwise the case was to be referred to a master, or such other order made as justice and equity might require.

R. Stone, for the appellants.

W. W. Rice and H. W. King, for the respondents.

C. ALLEN, J. The appeal is taken by the widow and minor children of William C. McKay; but it is apparent upon an examination of the will that it is the children who are chiefly, if not solely, interested.

The first question to be determined is, whether, in view of the fact that the surviving partner was one of the executors of the deceased partner, the contract of partnership, by its true construction, authorized the executors, as the legal representatives of the deceased, to make a final agreement with the surviving partner as to the price and terms upon which he should be at liberty to take the partnership assets. In the opinion

of a majority of the court, the contract should not receive this construction. Three modes are mentioned for the adjustment of the partnership affairs in case of the death of a partner: 1. The survivor shall have the option of taking the assets himself, at such price and terms as may be agreed upon by the legal representatives of the deceased and himself; 2. He may put the business into liquidation for the benefit of both parties; 3. If agreed upon by the survivor and the representatives of the deceased, the business may be carried on until the expiration of the agreement, provided always that the party so carrying it on shall at all times disclose his acts, the affairs of the firm, the books, and the account of stock to the representatives of the party so deceased. By these provisions, an intention is shown to preserve and realize in full the interest of the deceased partner, and not to give an option to the survivor to sacrifice it. If Denholm, the surviving partner, had been the sole executor, the agreement would not have the effect of allowing him to take the assets at a price fixed by himself alone; and it makes no difference in this respect that others are joined with him as executors. The transaction contemplated in the method first specified was virtually a sale, and the relation between the legal representatives of the deceased and the surviving partner was virtually that of vendor and purchaser. Although in point of fact, by successive wills, McKay appointed Denholm either sole or associate executor, the agreement must still be held to call for the existence of executors who should be able to act with sole reference to the interests of the estate, and independently of the interest of the surviving partner; and Denholm could not properly act on both sides of the same transaction, although there were two other executors: *Whichcote v. Lawrence*, 3 Ves. 740; *Morse v. Royal*, 12 Id. 355, 374; *Boynston v. Brastow*, 53 Me. 362.

It does not necessarily follow from this that the surviving partner would not be entitled, under the agreement, to take the assets at a fair valuation. Although it is sometimes declared that, if the mode of arriving at a valuation of a deceased partner's share which is provided in the articles of agreement cannot be strictly carried out, the whole thing fails, and a settlement must be made independently of the agreement, yet it is said in 2 Lindley on Partnership, 4th ed., 850, that the above rule must be taken with considerable qualification: See *Simmons v. Leonard*, 3 Hare, 581; *Dinham v. Bradford*, L. R. 5 Ch. 519. The great object of this provision in the agreement,

apparently, was to avoid the necessity of putting the business into liquidation by a sale, and thus of stopping the whole concern. Of course the executors, if competent to act in the matter, might sell the assets to the surviving partner, provided they could agree on the price and terms. There was no need of a special provision in the contract to say that. It seems reasonable to suppose that the parties meant to give to the surviving partner an option of taking the assets himself, as an independent right; and in the event of his electing to take them, the price and terms were to be agreed upon. But the mode of ascertaining the value is not necessarily of the essence of the contract; and it was said by Lord Hatherley, in *Dinham v. Bradford*, above cited, where the prescribed mode of arriving at a valuation could not be carried out: "If the valuation cannot be made *modo et forma*, the court will substitute itself for the arbitrators. It is not the very essence and substance of the contract."

But however this may be, and whether the contract should be deemed to be thus severable or not, since the executors assumed without due authority to fix the price at which Denholm might take the partnership assets, their agreement as to the price was not final, but might be avoided by those interested in the estate of McKay within a reasonable time. But such a transaction, though avoidable, will stand, unless within a reasonable time steps are taken to avoid it. This rule is of general application, whenever a sale is made by any one occupying a position of trust, if he is also interested directly or indirectly as purchaser: *Jones v. Dexter*, 130 Mass. 380, 383; 39 Am. Rep. 459; *Morse v. Hill*, 136 Mass. 60, 65; *Learned v. Foster*, 117 Id. 365; *Ives v. Ashley*, 97 Id. 198; *Yeackel v. Litchfield*, 13 Allen, 417; 90 Am. Dec. 207; *Wyman v. Hooper*, 2 Gray, 141; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Lewin on Trusts*, 7th ed., 448.

Two questions remain. One is, whether there has been any such delay or acquiescence on the part of the appellants as to cut them off from their right to hold the executors thus responsible. It is contended that the facts show such acquiescence on the part of the mother, and that, as she was guardian of the children, they also are bound thereby. The discussion of this question by counsel has been but slight. The rights of infants are sedulously protected by courts of law and of equity, as well as by statute. Illustrations of this may be found in the limited power of guardians to bind their infant

wards by express contract: *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414, 421; *Rollins v. Marsh*, 128 Id. 116; *Thacher v. Dinsmore*, 5 Id. 299; 4 Am. Dec. 61; in the statutes of limitation, which do not run against infants: Pub. Stats., c. 196, sec. 5; c. 197, sec. 9; in the doctrine of estoppel, which ordinarily is not applicable to infants or other persons incapable of contracting for themselves: *Pells v. Webquish*, 129 Mass. 469, 472; *Merriam v. Boston etc. R. R.*, 117 Id. 241, 244; *Pierce v. Chace*, 108 Id. 254, 258; *Bemis v. Call*, 10 Allen, 512; *Lowell v. Daniels*, 2 Gray, 161; 61 Am. Dec. 448; and in the rules of practice in courts of equity, as to the effect of answers by guardians: *Mills v. Dennis*, 3 Johns. Ch. 367; *James v. James*, 4 Paige, 115, 119; *Stephenson v. Stephenson*, 6 Id. 353; *Tucker v. Bean*, 65 Me. 352; *Turner v. Jenkins*, 79 Ill. 228, 232; *Berrett v. Oliver*, 7 Gill & J. 191; *Holden v. Hearn*, 1 Beav. 445, 455; 2 Kent's Com., 12th ed., 245; 1 Daniell's Chancery Practice, 5th ed., 169. The practice in Massachusetts is shown in *Walsh v. Walsh*, 116 Mass. 377; 17 Am. Rep. 162. The assent of a guardian *ad litem* of a minor *cestui que trust* to an account rendered by a trustee is no bar to a revision and correction of the account when reopened: *Blake v. Pegram*, 101 Mass. 592. The court say: "The fact that a guardian *ad litem* was appointed in order to give validity to the former decree does not protect the accounts from revision. The right to have errors corrected is recognized, even when the party interested was under no disability. And the assent of such a party to the account as settled in the probate court, or of a guardian *ad litem* in his behalf, does not preclude him": Id. 598. The doctrine is usually declared in general terms that laches is not to be imputed to an infant; and no exception is made of infants under guardianship. Thus in Lewin on Trusts, 7th ed., 449, it is said: "Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability." See also 1 Perry on Trusts, 3d ed., sec. 467; *Burns v. Thayer*, 115 Mass. 89; *March v. Russell*, 3 Mylne & C. 31, 44; *Blandford v. Marlborough*, 2 Atk. 542, 545; *Campbell v. Walker*, 5 Ves. 678; *Allen v. Sayer*, 2 Vern. 368; *Meanor v. Hamilton*, 27 Pa. St. 137; *Piatt v. Smith*, 12 Ohio St. 561, 571, 572. On the whole, in view of these authorities and considerations, we are of opinion that even if it be assumed that the conduct and delay of the mother showed such acquiescence as to bar her per-

sonally, respecting which it is unnecessary for us to give an opinion, the minor children are not affected thereby; and that under the Public Statutes, chapter 144, section 9, it is their right to have the former accounts of the executors opened so far as to correct any errors therein.

It now appears that, although the executors were guilty of no actual fraud, and intended to act fairly, and thought the price fixed a reasonable one at which to sell, yet the share of the deceased was worth a little more than the sum at which it was appraised, and that unintentionally and unconsciously Denholm was influenced in his judgment by his personal interest. The children are entitled to have the executors account for the full value of the share of the deceased. If this were not so, and they were cut off by the delay and acquiescence of their mother, it would be difficult to escape from the conclusion that she herself would be responsible, in the settlement of her accounts as guardian, for any loss thereby resulting to the children: *Pierce v. Prescott*, 128 Mass. 140, 146, 147.

The final question is, What is the measure of the liability of the executors? If the agreement is severable, so that Denholm was entitled as of right to take the assets at a fair valuation, it follows that it is now only necessary to ascertain and fix upon such fair valuation, and substitute it for the price actually agreed upon. But the same result would also be arrived at if the whole provision which was acted on in the agreement is treated as inoperative. Each case must depend on its own circumstances: *Robinson v. Simmons*, 146 Mass. 167. In the present case, the executors entered into this method of adjustment, believing that they had a right to do so, and they received and have accounted for a price which they thought reasonable, but which in fact was not quite enough. New partners entered the firm. The amount of capital belonging to McKay's estate, over and above the amount accounted for, which remained in the new business, was small. It would not be practicable, even if just, to follow it specifically, and ascertain how much it has earned in the subsequent business. What the executors ought to have accounted for was the full value of McKay's share at the time of the stock-taking; and we think it sufficient if they account for that value now, with interest, instead of the amount they actually accounted for.

The case must therefore be sent to a master to ascertain and report what was the fair value of the interest of the deceased

in the assets and business of the partnership at the time of the stock-taking.

Ordered accordingly. —

PARTNERSHIP — RIGHTS OF PERSONAL REPRESENTATIVES OF DECEASED PARTNER: *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460, and note 465; *Robinson v. Simmons*, 146 Mass. 167; 4 Am. St. Rep. 299.

LORD v. EDWARDS.

[148 MASSACHUSETTS, 476.]

WARRANTY IS OF QUALITY AT PORT OF SHIPMENT, AND NOT PORT OF DESTINATION, under a contract evidenced by the following letter from the sellers to the buyers: "We have made sale to you of twelve hundred tons extra Manila sugars, about No. 9 D. S. in color, at 10.10 per ton, f. o. b., and we understand it is your intention to load same on the Republic on her arrival at Manila. . . . It is further understood that the sugar is sold on a basis of 88° pol'r with 3d. per cwt. per degree downward, and fractions of degree in proportion. The sugars to be thoroughly sampled and tested on arrival."

CONTRACT to recover damages for a breach of warranty as to the test and color of twelve hundred tons of Manila sugar, sold by the defendants to the plaintiffs. The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions. Further facts are stated in the opinion.

C. T. Russell, Jr., for the plaintiffs.

L. S. Dabney, for the defendants.

MORTON, C. J. The contract between the parties is in the form of a letter, written at Boston by the agents of the defendants, addressed to the plaintiffs. The material parts of it are as follows: "We have made sale to you of twelve hundred tons extra Manila sugars, about No. 9 D. S. in color, at 10.10 per ton, f. o. b., and we understand it is your intention to load same on the Republic on her arrival at Manila. . . . It is further understood that the sugar is sold on a basis of 88° pol'r with 3d. per cwt. per degree downward, and fractions of degree in proportion. The sugars to be thoroughly sampled and tested on arrival. In due season we shall expect satisfactory bankers' credits at six months to be forwarded to our friends at Manila by cable." Under this contract, the defendants delivered free on board the Republic, at Manila, twelve hundred tons of sugar, which, as the jury have found, was equal to the test and

standard required in the contract, if that test and standard are to be applied to the sugar at Manila. But upon the arrival of the ship in New York, the sugar was sampled and tested, and it was found that it failed to test eighty-eight degrees by the polariscope, and was not equal in color to extra Manila sugar about No. 9 Dutch standard.

There was evidence tending to show that most cargoes of sugar coming from Manila lose some weight during the voyage, and are more or less sweated, even if there is no actual contact with salt water, and that in this case the sugars were sweated, and some salt water penetrated through the deck of the ship, and that they were exposed to wet when discharged, and thereby lost in strength and color. The only question now presented to us is, whether the standard guaranteed in the contract is the standard and quality of the sugar as it was upon its delivery on board the ship in Manila, or the standard in New York after its arrival. The question is not free from difficulty; but upon the whole, we are of opinion that, as was ruled at the trial, the defendants fulfilled their contract when they delivered at Manila sugar of the color and strength specified therein, and that they are not responsible for any risks of the voyage which caused a deterioration of the sugar.

Both parties agree, and it is clear, that upon the delivery of the sugar on board the ship, and the payment for it, the property in it passed to the plaintiffs. It is equally clear that the defendants did not assume any risks of damage to the goods by the perils of the sea. It was a sale of certain goods of a specified quality at Manila, and not at New York. The nature and scope of the transaction being that of a completed sale of goods, which were to be exposed to the perils of the sea, and other risks of a long sea voyage, and which were taken entirely out of the custody or oversight of the sellers, it is not to be presumed that they assumed any risks of its future condition, unless there be an express and clear stipulation to that effect.

The plaintiffs contend that such a stipulation is implied in the words, "the sugars to be thoroughly sampled and tested on arrival." This is certainly not an express stipulation that the sugar, upon arrival in New York, shall be of a specified quality. It cannot be claimed under this clause that, if the goods were damaged by a peril of the sea, the defendants would be responsible. It does not import a warranty against damage by perils of the sea, and we cannot see that it necessarily or rea-

sonably imports a warranty against damage from wet weather or from sweating, or other causes of deterioration operating during a long voyage. The clause in question seems to be an independent clause, inserted probably because it was thought important or desirable that the parties should know the condition of the sugar upon its arrival. Such knowledge might be important in case of any controversy as to the condition of the sugar when shipped. But whatever the reasons for its insertion, we cannot reasonably construe it as importing a stipulation which is contrary to the spirit and scope of the contract which contemplated a completed sale and delivery at Manila.

Exceptions overruled.

SALES — WARRANTY. — By the code of California, "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care": *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199, and see note 207; *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30.

CONTRACT TO DELIVER ARTICLES AT FUTURE DAY, whether they are to be manufactured or are already on hand, implies that they must be merchantable, — at least, of medium quality or goodness: *Howard v. Hoey*, 23 Wend. 350; 35 Am. Dec. 572.

FOGG v. BOSTON AND LOWELL RAILROAD CORPORATION.

[148 MASSACHUSETTS, 512.]

CORPORATION IS RESPONSIBLE IN DAMAGES FOR PUBLICATION OF LIBEL, which is shown to have been made by its authority, or to have been ratified by it, or to have been made by a servant or agent in the course of the business in which he was employed.

LIBEL — EVIDENCE TO CHARGE CORPORATION WITH PUBLICATION OF LIBEL — Evidence should be submitted to the jury, in an action for libel against a railroad company, as showing that the company both authorized and ratified the publication, and that the publication was made by its servants or agents in the course of their employment, where it shows that a libelous extract from a newspaper, indicating that a neighboring ticket-broker was not a reliable person from whom to buy tickets, was kept posted forty days in a conspicuous place in an office of the defendant, arranged especially for the sale and advertising of railroad tickets, and in the immediate charge of an employee, and the general passenger agent, although notified, refused to interfere with such posting.

TORT by George O. Fogg, against the Boston and Lowell Railroad Corporation, to recover damages for an alleged libel. The plaintiff was a railroad ticket-broker, doing business at

No. 277, Washington Street, in the city of Boston. The defendant had an office at No. 218, on the same street, arranged especially for the sale and advertising of tickets, which was in the immediate charge of an employee named Dow. On May 9, 1885, the Boston Herald published what purported to be a dispatch from New York City, headed, "Alleged Ticket Swindle." "A Boston man charged with swindling a poor woman,"—and which read as follows: "Catherine Egan, of Kansas City, cried bitterly at Castle Garden to-day, as she told how she had been swindled. She made affidavit that she went to Boston to get her two children, who had just landed. Mr. Fogg, of 272 Washington Street, she said, sold her two tickets to Chicago for sixteen dollars. They proved to be one-dollar tickets sold by the Pennsylvania Railroad some months ago, and are now worthless. Superintendent Jackson telegraphed to the chief of police of Boston to arrest Fogg, and sent the woman and children back to Boston." The paper printed a retraction in the evening edition of the same day. On the following day, a copy of the dispatch, cut from the Herald, was posted in a conspicuous place in the defendant's office, where everybody who entered for the transaction of business might see it. On May 22d, the plaintiff went to the defendant's office, and after some conversation with one of the clerks in relation to the placard, removed it. Dow, however, immediately procured another copy of the article, and hung it up again in the office, where it remained until about April 20th. On the same day the plaintiff notified one Tuttle, the defendant's general passenger and ticket agent, of the publication, and requested him to have it stopped, but Tuttle wrote a letter declining to interfere with it, and referred the plaintiff to Dow. It appeared that Tuttle "was in general charge, on behalf of said corporation, of all the tickets and sales of tickets for the transportation of passengers over the road of the defendant corporation and its connections, and had general control and supervision of all the offices used for and the agents employed by said corporation in the sale of said tickets." The judge ruled that there was no evidence to go to the jury, and directed a verdict for the defendant. The plaintiff alleged exceptions.

E. Merwin, E. L. Buffinton, and C. W. Bartlett, for the plaintiff.

S. Lincoln and W. H. Coolidge, for the defendant.

KNOWLTON, J. A corporation is liable in damages for the publication of a libel, as it is for its other torts: *Whitfield v. South Eastern R'y*, El. B. & E. 115; *Philadelphia etc. R. R. v. Quigley*, 21 How. 202; *Samuels v. Evening Mail Ass'n*, 75 N. Y. 604, following the dissenting opinion in 9 Hun, 288. To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed.

In the present case, we think there was evidence against the defendant, upon each of these grounds, which should have been submitted to the jury for their consideration.

It was admitted that a libelous extract from a newspaper was kept posted forty days in a conspicuous place in the defendant's office in Boston, which was arranged especially for the sale and advertising of railroad tickets, and was in the immediate charge of one of the defendant's employees. The plaintiff was a railroad ticket-broker doing business on the same street. The statements in the libel indicated that he was not a safe and reliable person from whom to buy tickets. From the evidence in the case, the jury might have inferred that the defendant's office was used, not merely for advertising tickets, but for advertising and publishing any other information of interest to persons about to purchase tickets, which would be likely to induce them to buy at the defendant's office rather than elsewhere. One who maintains a place of business may be presumed to have general knowledge of what is done there. The jury might properly have found that the defendant, having its principal terminus and the offices of its principal managing agents in Boston, had knowledge from time to time of what kinds of advertisements and notices were posted in its ticket-office there, and that the libel would not have remained so long in that conspicuous place if the corporation had not originally authorized, or afterwards ratified, the act of posting it.

But there was additional evidence of ratification of this publication by the defendant. We have the letter of the defendant's general passenger agent, written nearly a month before the publication was discontinued, in which he declined to interfere with it. This agent "was in general charge, on behalf of said corporation, of all the tickets and sales of tickets for the transportation of passengers over the road of the defendant corporation and its connections, and had the general control

and supervision of all the offices used for and the agents employed by said corporation in the sale of said tickets." He was the representative of the corporation, to determine in its behalf what kinds of notices should be posted in its ticket-offices. His determination to permit the libel to remain before the eyes of the public in the defendant's ticket-office was an act of the defendant; and it was evidence from which, in connection with the other evidence in the case, the jury might have inferred a ratification of the original publication, and also a publication from that time by the defendant: *Baldwin v. Casella*, L. R. 7 Ex. 325; *Smith v. Water Commissioners*, 38 Conn. 208; *St. James Parish v. Newburyport and Amesbury Horse R. R.*, 141 Mass. 500.

Upon the third ground, we think it was a question for the jury on the whole evidence, whether the defendant was not responsible for the original act of Dow, without actual knowledge or subsequent ratification of it. Dow was in charge of the office, subject to the supervision of the general passenger agent. One of the uses of the office was to advertise tickets, and presumptively to furnish information in relation to the purchase of tickets. It may be inferred that it was a part of his duty to post in the office notices pertaining to the business carried on there. The libel which he posted was calculated to diminish the plaintiff's, and thereby to increase the defendant's, income from the sale of tickets. In these and other facts and circumstances, there was evidence that his act was done in the course of his business as a servant of the defendant. If it was so done, the defendant is liable for it, even though it was in excess of his authority and wrongful: *Howe v. Newmarch*, 12 Allen, 49; *Hawes v. Knowles*, 114 Mass. 518; 19 Am. Rep. 383; *Levi v. Brooks*, 121 Mass. 501; *Goddard v. Grand Trunk R'y*, 57 Me. 202; 2 Am. Rep. 39; *Philadelphia and Reading R. R. v. Derby*, 14 How. 468.

Exceptions sustained.

CORPORATION IS LIABLE TO AN ACTION FOR LIBEL: *Evening Journal Ass'n v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293; *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672, and note 681.

WARD v. COBB.

[148 MASSACHUSETTS, 518.]

BROKER, WHEN ENTITLED TO COMMISSION ON SALE OF REAL ESTATE. —

Sale is effected, so as to entitle a real estate broker to his commission, within the meaning of a contract by which the vendor agreed to pay him a commission if he should "effect a sale" of certain real estate, where such contract was made after the terms of a sale between the vendor and vendee, brought together by him, were settled, and subsequently the parties signed an agreement to sell and buy within a certain time, on condition that a certain release should be procured, and afterwards, solely because of the failure of the vendee to pay as agreed, the vendor notified him that "the matter was at an end," and retained the money already paid by the vendee as a forfeit.

CONTRACT by Henry B. Ward against Elizabeth Cobb, for commissions alleged to be due the plaintiff on the sale of real estate for the defendant. On August 2, 1887, the defendant placed in the hands of the plaintiff, a real estate broker, certain real estate which she desired to sell. On the following day, the plaintiff communicated to the defendant an offer for the property which he had received from Francis L. Brown. A few days afterwards the defendant and Brown met at the plaintiff's office and agreed on the terms of a sale, and the defendant drew up a written agreement for signature, which the defendant took away to show to her attorney. Thereafter, on August 10th, the plaintiff and defendant made the following contract: "It is agreed that if Henry B. Ward, as broker, shall effect a sale of Elizabeth Cobb's estate, 855 Main Street, Cambridge, he shall receive a commission of two hundred dollars in full for his services." On August 16th, an agreement was signed by the defendant, as party of the first part, and Brown, as party of the second part, by which the defendant agreed "to sell," and Brown agreed "to purchase," the real estate, the agreement further providing: "Said premises are to be conveyed within fifteen days from this date by a good and sufficient warranty deed of the party of the first part, conveying a good and clear title to the same free from all encumbrances, except a mortgage held by the Massachusetts Hospital Life Insurance Company, on which there is due fifteen thousand dollars and accrued interest from the last semi-annual payment in April last, and taxes for the current year, all which mortgage, interest, and taxes the said Brown agrees to assume and pay, and hold the said Cobb harmless therefrom, but the deed is not to be delivered unless and until the Massachusetts Hospital Life Insurance Company releases said

Cobb and the estate of Charles D. Cobb from all liability on said mortgage note; and for such deed and conveyance the party of the second part is to pay the sum of two thousand dollars in money for the equity of said Cobb in said estate, over and above said mortgage, interest, and taxes, of which two hundred dollars have been paid this day, and eighteen hundred dollars are to be paid in cash upon the delivery of said deed. Full possession of the said premises, free of all tenants, is to be delivered to the party of the second part on or before September 30th next, the said premises to be then in the same condition in which they now are, reasonable use and wear of the buildings thereon only excepted. And the sum this day paid is to be forfeited to said Cobb if said Brown does not keep and perform this contract as above set forth." The defendant prepared a deed of the premises, and placed it in the hands of her attorney to be delivered to Brown, in accordance with the terms of the agreement. Brown was unable to perform on his part, and obtained from the attorney three different extensions of time. At the end of two weeks and a half, the attorney met Brown, and told him the matter was at an end. The defendant retained the two hundred dollars which had been paid. The plaintiff had judgment, and the defendant appealed.

S. J. Thomas, for the plaintiff.

A. Russ and D. A. Dorr, for the defendant.

KNOWLTON, J. The question at issue in this case is, whether the agreement entered into between the defendant and Francis L. Brown was a sale of the defendant's real estate, within the meaning of the contract declared on. The defendant's counsel do not contend that the words in the contract, "shall effect a sale," exclude from consideration former efforts of the plaintiff to sell the property, if those efforts finally resulted in a sale. Before the written contract between the plaintiff and the defendant was made, the plaintiff had agreed with Brown on the terms of a sale, and had drawn up and submitted to him a written contract, which the defendant had taken away to show to her attorney. If what the plaintiff had before done brought about a sale, he is entitled to the commission for which he sues.

The writing signed by the defendant and Brown was a contract of sale. It was not in the form required to pass the legal title to the real estate, but it gave him an equitable right, and

it bound her to make a conveyance, and him to take it and pay for it. Specific performance would have been decreed by a court of equity upon application by either of the parties. It was made subject to the contingency that the Massachusetts Hospital Life Insurance Company should consent to release the defendant from liability upon the mortgage note, and either party seeking to enforce it would have been obliged to show such consent; but there is nothing to indicate that the company was unwilling to release her, or that her conduct in relation to the contract was affected by this provision in it. Upon Brown's failure to make payment according to the terms of the contract, and upon the continuance of his delinquency for two and a half weeks, the defendant's attorney told him "the matter was at an end," and the defendant kept the two hundred dollars which had been paid, and voluntarily gave up her right to sue for the balance of the purchase-money, or to obtain a decree for specific performance.

The defendant saw fit to make the sale upon fifteen days' credit, with no security for payment of the price, except the two hundred dollars which was given her when the contract was signed. The terms of sale were apparently satisfactory to her; at least they were such as she chose to accept. It is a fair inference from the conduct of both parties, and especially from her retention of the two hundred dollars, that the contingency had happened upon which she had a right to enforce the contract. We are of opinion that a sale was effected, within the meaning of the agreement in relation to the plaintiff's commission. This conclusion is in accordance with many decisions in similar cases: *Rice v. Mayo*, 107 Mass. 550; *Chapin v. Bridges*, 116 Id. 105; *Pearson v. Mason*, 120 Id. 53, 57; *Desmond v. Stebbins*, 140 Id. 339; *Veazie v. Parker*, 72 Me. 443; *Coleman v. Meade*, 13 Bush, 358; *Love v. Miller*, 53 Ind. 294; 21 Am. Rep. 192.

Judgment affirmed. °

BROKER, WHEN ENTITLED TO COMMISSIONS ON SALE OF REAL ESTATE: *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168, and note 175-178. One acting as broker of both parties to an exchange of lands may not recover compensation from either, even upon an express promise, without clearly showing that each had full knowledge of all the circumstances, and assented to the double employment: *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528; *Scribner v. Collar*, 40 Mich. 375; 29 Am. Rep. 541.

REAL ESTATE AGENTS — COMMISSIONS FOR SALES BY — RECENT CASES. — An agent or broker is entitled to his commission when he has procured a party able, ready, and willing to purchase upon the owner's terms, although

the agent has not made a binding contract of sale with such purchaser: *Buckingham v. Harria*, 10 Col. 455; because where the agent produces a purchaser ready, able, and willing to buy upon the owner's terms, the agent being the procuring cause of the sale, he is always entitled to his commission: *Zeimer v. Antisell*, 75 Cal. 509; although the owner himself really consummates and completes the sale with the purchaser originally procured by the agent: *Ratts v. Shepherd*, 37 Kan. 20; *Nicholas v. Jones*, 23 Neb. 813; *Butler v. Kennard*, 23 Id. 357; *Potvin v. Curran*, 13 Id. 302; *Dreisback v. Rollins*, 39 Kan. 268; *Hefner v. Chambers*, 121 Pa. St. 84; nor is the agent cut out of his right to commission, where having performed his duty, the sale falls through by reason of the owner's fault, such as a defect in title, etc.: *Birmingham etc. Co. v. Thompson*, 86 Ala. 146; *Sayre v. Wilson*, 86 Id. 151; *Roberts v. Kimmons*, 65 Miss. 322; *Parker v. Walker*, 86 Tenn. 566; so an agent is entitled to his whole commission when the owner in completing the sale himself sells for a less sum than he had authorized the agent to sell for: *Ratts v. Shepherd*, 37 Kan. 20. The agent is entitled to his commission where he effects a valid written agreement for sale with a proposed purchaser upon the terms acceptable to the owner: *Parker v. Walker*, 86 Tenn. 566; but an agent who simply effects a mere parol agreement for sale, which is repudiated by the proposed purchaser before its reduction to writing, without any fault upon the part of the owner of the realty, is not entitled to commissions: *Gilchrist v. Clarke*, 86 Id. 583.

REAL ESTATE AGENTS — MISCELLANEOUS RECENT CASES. — If an agent effects a sale according to the terms specified, but through a supposed mistake as to the identity of the land withdraws from the sale, he is entitled to his commission, where the owner desires to procure a higher price and does not labor under the same mistake as to the identity of the land: *Sayre v. Wilson*, 86 Ala. 151. An agent has a special lien upon a deed delivered to him by his principal, for his commission in effecting the sale in pursuance of which such deed was executed, and for all his other services done and payments made in negotiating the sale; but the agent does not usually have the right of a general lien in such cases: *Richards v. Gastill*, 39 Kan. 428. In Tennessee, real estate agents must be licensed, and without a license an agent cannot recover his commission for negotiating a sale of realty, although such sale be in all other respects regularly negotiated: *Stevenson v. Ewing*, 87 Tenn. 46. In a suit for commissions by an agent, evidence that the sale was effected by another agent is competent and material in defendant's behalf: *Newton v. Ritchie*, 75 Iowa, 91. An agent cannot be both the agent of the seller and the purchaser, for his duties in such a dual capacity would be more or less incompatible: *Webb v. Paxton*, 36 Minn. 532. An agent cannot by fraud, as against his principal, so negotiate a sale of realty as to get the title to the same in himself, although in the absence of fraud, and with the ratification of the principal, an agent may sell to a third party, and then receive a conveyance of the realty back to himself: *Bookwalter v. Lansing*, 23 Neb. 291. An agent, though not really the procuring cause of a sale of realty, may sue for the value of his services rendered upon a *quantum meruit*: *Gregg v. Loomis*, 22 Id. 174. Where a purchaser is not procured by an agent, no right of compensation accrues for negotiating a sale: *Sloman v. Bodwell*, 24 Id. 790.

COMMONWEALTH v. DONAHUE.

[148 MASSACHUSETTS, 522.]

CRIMINAL LAW — RECAPTION OF ONE'S PERSONAL PROPERTY BY FORCE —

One whose personal property has been wrongfully taken from him by another may thereupon retake possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon, and is not liable criminally for so doing.

INDICTMENT for robbery. The facts are stated in the opinion.

A. J. Waterman, attorney-general, for the commonwealth.

J. McIlvene, for the defendant.

HOLMES, J. This is an indictment for robbery, on which the defendant has been found guilty of an assault. The evidence for the commonwealth was, that the defendant had bought clothes, amounting to \$21.55, of one Mitchelman, who called at the defendant's house, by appointment, for his pay; that some discussion arose about the bill, and that the defendant went upstairs, brought down the clothes, placed them on a chair, and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money, and put it in his pocket, and told the defendant he owed him \$1.55, whereupon the defendant demanded his money back, and on Mitchelman refusing, attacked him, threw him on the floor, and choked him until Mitchelman gave him a pocket-book containing \$29. The defendant's counsel denied the receiving of the pocket-book, and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this, the defendant saved his exceptions, and declined to introduce evidence; the jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth, it appeared, or at

the lowest the jury might have found, that the defendant offered the twenty dollars to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case,—since Mitchelman of course whatever the sum due him, had no right to that particular money, except on the conditions on which it was offered: *Commonwealth v. Stebbins*, 8 Gray, 492,—he took the money wrongfully from the possession of the defendant, or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud: *Commonwealth v. Devlin*, 141 Mass. 423, 431; *Chisser's Case*, T. Raym. 275, 276; *Regina v. Thompson*, Leigh & C. 225; *Regina v. Stanley*, 12 Cox C. C. 269; *Regina v. Rodway*, 9 Car. & P. 784; *Rex v. Williams*, 6 Id. 390; 2 East P. C., c. 16, secs. 110, 113; see *Regina v. Cohen*, 2 Den. C. C. 249, and cases *infra*. The defendant made a demand, if that was necessary, which we do not imply, before using force: *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, L. R. 8 Q. B., N. S., 197; *Commonwealth v. Clark*, 2 Met. 23, 25, and cases *infra*.

It is settled by ancient and modern authority that, under such circumstances, a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon: *Commonwealth v. Lynn*, 123 Mass. 218; *Commonwealth v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt. 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton*, Moody & M. 107; Year Book, 9 Edw. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Id. 27, pl. 9; see *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224; Yel. 157; 1 Brownl. 215; *Shingleton v. Smith*, Lut. 1481, 1483; 2 Inst. 316; Finch's Law, 203; 2 Hawk. P. C., c. 60, sec. 23; 3 Bla. Com. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned *Baldwin v. Hayden*, 6 Conn. 453; Year Book, 19 Hen. VI. 31, pl. 59; *Rogers v. Spence*, 13 Mees. & W. 571, 581; 2 Hawk. P. C., c. 60, sec. 23; 3 Bla. Com. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has

been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law: *Blades v. Higgs*, 10 Com. B., N. S., 713; 12 Id. 501; 13 Id. 844; 11 H. L. Cas. 621; *Commonwealth v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted through the fraud of the latter: *Hodgeden v. Hubbard*, 18 Vt. 504; 46 Am. Dec. 167; see *Johnson v. Perry*, 56 Vt. 703; 48 Am. Rep. 826. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful: *Bobb v. Bosworth*, Litt. Sel. Cas. 81; 12 Am. Dec. 273; see *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whitridge*, 2 Strob. 232; 3 Bla. Com. 4. It is unnecessary to decide whether, in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain if he could, even if he knew that Mitchelman still had the identical money upon his person.

If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law: *Commonwealth v. Clark*, 2 Met. 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge

of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Regina v. Boden*, 1 Car. & K. 395, 397; *Regina v. Hemmings*, 4 Fost. & F. 50; *State v. Hollyway*, 41 Iowa, 200; 20 Am. Rep. 586; compare *Commonwealth v. Stebbins*, 8 Gray, 492; *Commonwealth v. McDuffy*, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts: *State v. Nash*, 88 N. C. 618. The facts were as the defendant believed them to be.

Exceptions sustained.

RECAPTION OF PERSONAL PROPERTY is made the subject of a note to *Barnes v. Martin*, 82 Am. Dec. 673-678, where the cases are collected.

OWNER OF LAND MAY EXPEL, WITH REASONABLE FORCE, a wrongful occupant without being liable to any civil action, although he may be liable for a breach of the peace, or for forcible entry: *Souter v. Codman*, 14 R. L. 119; 51 Am. Rep. 364, and note 366. But a mere trespass upon another's realty will not justify the using of a dangerous weapon to resist the trespasser: *Everton v. Esgate*, 24 Neb. 235.

MCINTIRE v. LEVERING.

[148 MASSACHUSETTS, 546.]

MALICIOUS PROSECUTION — WANT OF PROBABLE CAUSE — EVIDENCE OF PLAINTIFF'S GOOD REPUTATION. — Plaintiff may show his good reputation, known to the defendant when the prosecution was commenced, in an action for malicious prosecution upon a criminal charge, in order to prove that the prosecution was without probable cause.

EVIDENCE — STATEMENTS MADE BY THIRD PERSONS IN ABSENCE OF PARTY. — Statements concerning the perpetration of the crime, made by third persons in the absence of the defendant, and not shown to have been communicated to him, to the justice before whom the defendant swore out the warrant for the plaintiff's arrest, are inadmissible on behalf of the defendant in an action for malicious prosecution.

MALICIOUS PROSECUTION — WANT OF PROBABLE CAUSE — EVIDENCE TO SHOW DISTRUST BY DEFENDANT OF PERSON ON WHOSE INFORMATION HE RELIED IN MAKING ARREST. — Declaration by defendant in action for malicious prosecution, prior to such prosecution, that he had heard that the person on whose information of the plaintiff's guilt he had relied in making the arrest, had been in jail, is admissible on behalf of the plaintiff, to show want of probable cause, in that such person was not a credible person.

TORT by Delia McIntire against William Levering, for malicious prosecution for larceny. The plaintiff, as part of her case, was permitted, against the defendant's objections, to show her good reputation in the community. The defendant's evidence tended to show that he was absent from his

house on July 27, 1887, and on his return the next day, one Madden, his hired man, informed him that his (Madden's) wife had confessed to him that she, in company with the plaintiff and another, had broken into the defendant's premises, and had stolen his wine; that one Hewett, a boy, also informed him that he saw an ax, which was found on the premises, in the hands of the plaintiff's daughter on the day of the theft; that Madden and Hewett went to the office of a justice and related the facts, and the justice informed Madden that the defendant was the proper person to make a complaint; and that thereupon the plaintiff appeared before the justice and swore to a complaint against the plaintiff for the larceny of the wine. The defendant then offered to introduce in evidence the statements of Madden and Hewett to the justice; but they were excluded because not made in the presence of the defendant. The plaintiff was permitted, in rebuttal, against the defendant's objections, to ask the plaintiff's husband, who was a witness, whether, in a conversation with the defendant before the complaint was made, the defendant had said "that he had heard that Mrs. Madden had been in Dedham jail"; to which the witness replied in the affirmative. The plaintiff had a verdict, and the defendant alleged exceptions.

H. F. Naphen, for the plaintiff.

T. J. Morrison, for the defendant.

KNOWLTON, J. There is some conflict of authority as to the competency of evidence of the reputation of the plaintiff in a trial of an action for malicious prosecution. There are many cases in which it is held that, in actions of this kind, as in actions of slander, the general bad reputation of the plaintiff may be shown in mitigation of damages. There are also decisions that, in suits for malicious prosecution, such reputation may be shown to meet the allegation of want of probable cause: *Bacon v. Towne*, 4 Cush. 217, 241; *Pullen v. Glidden*, 68 Me. 559; *Barron v. Mason*, 31 Vt. 189; *Rodriguez v. Tadmire*, 2 Esp. 721; *Gregory v. Thomas*, 2 Bibb, 286; 5 Am. Dec. 608; *Bostick v. Rutherford*, 4 Hawks, 83; *Gregory v. Chambers*, 78 Mo. 294; *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169. But cases do not go so far as to permit proof of particular instances of bad conduct.

In determining whether there is probable cause for a prosecution for the commission of a crime, the known character or

general reputation of the person suspected is always an element of some importance; for, as was said by Chief Justice Shaw, in *Bacon v. Towne*, *supra*, "the same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation." In a suit of this kind, where the prosecution complained of was for an offense implying moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad.

We see no good reason why the plaintiff should not be permitted, on the other hand, to show affirmatively that it was good. It is true that every one is presumed to be of good character until the contrary appears, and this presumption ordinarily saves the necessity of proof. Indeed, in civil cases, as a general rule, evidence of reputation is not competent upon a question as to liability for a particular act. But whenever character is in issue, the rule is different. One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis*, he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for a malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution, he would have had the right to show his good reputation, although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character necessarily appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation, known to the defendant when the prosecution was commenced. In several of the states there are adjudications to this effect: *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Blizzard v. Hays*, 46 Ind. 166; 15 Am. Rep. 291; *Israel v. Brooks*, 23 Ill. 575; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *Scott v. Fletcher*, 1 Over. 488. The defendant's exception to the admission of this kind of evidence must be overruled.

Testimony of statements by Madden and Hewett to the justice who issued the warrant, made in the absence of the

defendant, was rightly excluded. The statements cannot be treated as facts tending to show the plaintiff's guilt, and competent as evidence for that purpose, which the defendant may be presumed to have known, even though his knowledge of them is not distinctly shown: See *Bacon v. Towne*, 4 Cush. 217, 241. They are mere declarations of third persons, which do not appear to have been communicated to the defendant, and which have no bearing upon either of the questions at issue in the case.

The third exception presents a question of more difficulty. To show that the prosecution was not without probable cause, the defendant relied upon a statement of Mrs. Madden, communicated to him by her husband, that she, accompanied by the plaintiff and another, broke into the defendant's premises, and stole his wine. It became a question for the jury to determine how far the defendant was warranted in believing her statement, and how far he did in fact believe it. It is quite clear that it would not be competent to attack the credibility of a witness in a trial by proving that he had been confined in jail, or that he had been guilty of any unlawful or criminal act. Nothing less than proof of conviction of a crime would be admissible. But this rule rests upon considerations of public policy, which forbid the introduction of evidence of particular acts, involving a trial of new and unexpected issues, for which the opposing party could not be expected to be prepared. There can be no doubt that one's known acts of misconduct, indicating his character, may properly be considered in determining his credibility.

A witness was permitted to testify that the defendant, before the complaint was made, said "that he had heard that Mrs. Madden had been in Dedham jail." If that statement tended to show, as against the defendant, that she was less credible than other persons, it was competent evidence upon the question whether there was probable cause for the prosecution. If it had no proper bearing upon her credibility, but at the same time indicated distrust of her on the part of the defendant, it was competent on the question whether the prosecution was malicious. It may be argued, with much force, that one who should say colloquially of another that he had been in jail, would probably mean that he had been there under such circumstances as to affect his reputation, and to indicate that he was untrustworthy. So, to say of another that one has heard that he has been in jail, implies some degree of

credence in the story. The evidence in the present case seems to have been of little importance. Yet it purported to show what was in the defendant's thoughts before the complaint was made. Upon the facts disclosed, we cannot say that the jury might not properly consider it.

Exceptions overruled.

MALICIOUS PROSECUTION — EVIDENCE AS REGARDS WANT OF PROBABLE CAUSE: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note 327; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832, and note 837; *Clements v. Excavating etc. Co.*, 67 Md. 461; 1 Am. St. Rep. 409, and note 412.

MANUFACTURERS' NATIONAL BANK v. CONTINENTAL BANK.

[148 MASSACHUSETTS, 552.]

BANKS AND BANKING — COLLECTION OF CHECKS — AGENCY. — A national bank which becomes the agent of another bank to collect checks and drafts, under a contract by which the agent might mingle the proceeds collected with his own money, making itself the principal debtor for the amount received, but by which no debt was created until the checks or drafts were paid, has no right to collect a check and take the proceeds as his own upon its becoming insolvent; and where a check was indorsed by it "for collection" of the principal, and was sent by it to a sub-agent bank, which collected the check after the agent had suspended, the subagent is liable to the principal for the proceeds thereof.

CONTRACT by the Manufacturers' National Bank of Boston against the Continental Bank of St. Louis and trustee, to recover the amount of a check which had been sent by the plaintiff to the Fidelity National Bank of Cincinnati for collection, and by the latter sent for the same purpose to the defendant bank. The defendants had judgment, and the plaintiff alleged exceptions.

J. D. Ball, for the plaintiff.

J. R. Bullard, for the defendants.

KNOWLTON, J. In the transaction upon which the plaintiff's claim is founded, the plaintiff and the Fidelity National Bank stood in the relation to each other of principal and agent. The business in which they were engaged was the collection of checks and drafts which belonged to the plaintiff or to the plaintiff's customers. Their contract contained in their letters shows, first, an offer to the plaintiff by the Fidelity

National Bank of its "services for making collections in the West," and then a proposition to credit sight items at par, subject to payment, and to make collections, remitting weekly in New York exchange, without charge. This proposition was accepted by the plaintiff, and the Fidelity National Bank thereby became the plaintiff's agent to collect for it commercial paper. Under this arrangement the credit given for a check was merely provisional until the check was paid. It did not create a debt from the Fidelity National Bank to the plaintiff, and it did not change the ownership of the check: *Levi v. National Bank of Missouri*, 5 Dill. 104; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. In that respect their relations to each other were very different from those between a banker and a depositor, where checks are received on deposit as cash, and an absolute right to draw against them is given: *White v. National Bank*, 102 U. S. 658; *Scott v. Ocean Bank*, 23 N. Y. 289; *Dickerson v. Wason*, 47 Id. 439; 7 Am. Rep. 455; *Metropolitan National Bank v. Loyd*, 90 N. Y. 530; *Ayres v. Farmers' and Merchants' Bank*, 79 Mo. 421; 49 Am. Rep. 235.

Their dealings under the contract were in conformity to this construction of it. It was a custom of the Fidelity National Bank to charge back to the plaintiff, and to return to it by mail, checks and drafts which were not paid. The indorsement of the check which the defendant collected was "for collection for Manufacturers' National Bank of Boston, Mass." This indorsement would give notice of the plaintiff's title to all parties into whose hands the check might come: *Sweeny v. Easter*, 1 Wall. 166, 173; *Blaine v. Bourne*, 11 R. I. 119; 23 Am. Rep. 429; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Merchants' National Bank v. Hanson*, 33 Minn. 40; 53 Am. Rep. 5.

In one particular the contract in question differed from an ordinary contract for the collection of a principal's money by an agent. Upon the collection of a draft or check, the Fidelity National Bank was not required to keep the proceeds by itself as the plaintiff's property, but might mingle it with its own money and make itself the plaintiff's debtor for the amount received. As soon as the proceeds became a part of the funds of the Fidelity National Bank under this arrangement, the plaintiff's right to control it as specific property was gone, and the plaintiff had instead a right to recover a corresponding sum of money. The Fidelity National Bank ceased to do business on June 20, 1887, and on the following day a national

bank examiner was put in charge of its assets by the controller of the currency, and he continued in charge until a receiver was appointed under the laws of the United States. The check was not collected by the defendant until June 22, 1887. At that time the right of the Fidelity National Bank to mingle with its own funds the proceeds of a check collected for the plaintiff had terminated.

It was implied in the contract under which the collection was made that the Fidelity National Bank should continue in business as a national banking association. When it ceased to do banking business, it lost the right to appropriate to itself the proceeds of the plaintiff's property, and to substitute for the money its own liability as for a debt. It had lost the power to perform its undertaking and to make weekly remittances of the amounts collected, for its doors had been closed, and it was in the custody of the law. Since it could not make the remittances, it could not lawfully, under its contract, collect the plaintiff's check, and take the proceeds as its own: *Cragie v. Hadley*, 99 N. Y. 131, 133. If a payment to the defendant as its agent, and an entry of a credit by the defendant for the money, would have passed the property to the Fidelity National Bank, if it had then been regularly doing business, such a payment made after it was insolvent and in charge of the controller had no such effect. The implied condition in reference to which both parties contracted had ceased to exist. The continuance of the right of the bank to do business under the laws of the United States was of the very essence of the agreement which permitted it to receive the plaintiff's money as a credit to be accounted for: *Audenried v. Betteley*, 8 Allen, 302; *Story on Agency*, 9th ed., 486. This has been expressly decided in the case of *First National Bank v. First National Bank*, 76 Ind. 561, 40 Am. Rep. 261, which is very similar to the case at bar. We are of the opinion that the check in the hands of the defendant was the plaintiff's property until it was paid, and that the proceeds of it did not pass to the Fidelity National Bank, and that the plaintiff is entitled to recover.

Exceptions sustained.

BANKS AND BANKING — COLLECTIONS — DUTIES AND LIABILITIES OF COLLECTING BANK: *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243; 79 Am. Dec. 328; *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60; 99 Am. Dec. 407; *Kuyper v. Bank of Galena*, 34 Ill. 328; 85 Am. Dec. 309; *Milliken v. Shapleigh*, 36 Mo. 596; 83 Am. Dec. 171; *Briggs v. Central Nat. Bank*, 89 N. Y. 182; 42

Am. Rep. 285; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561; 40 Am. Rep. 261. A banker who has received from his correspondent a draft indorsed for collection, which is indorsed in like manner to his correspondent, cannot collect the money and appropriate the proceeds to the latter's debt to him, and refuse to pay the owner. He has received the owner's money, knowing by the indorsements upon the draft that it is his, and will not be permitted to withhold it from him: *City Bank of Sherman v. Weiss*, 61 Tex. 331; 60 Am. Rep. 29; and see *Blaine v. Bourne*, 11 R. I. 119; 23 Am. Rep. 429; *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665.

LINCOLN v. CITY OF BOSTON.

[148 MASSACHUSETTS, 573.]

MUNICIPAL CORPORATIONS — PERSONAL INJURIES — FIRING OF CANNON IN PUBLIC PARK. — City of Boston is not liable for injuries sustained by a person by reason of his horse becoming frightened, while being driven upon an adjoining street, through the firing of cannon on the Common under a license granted in pursuance of an ordinance of the city.

TORT by William H. Lincoln, against the city of Boston, to recover damages for personal injuries sustained. The declaration alleged that on August 11, 1888, while the plaintiff was driving, in the exercise of due care, in a buggy upon Charles Street in Boston, past the Common, his horse became frightened, through the firing of cannon on the Common, and ran away, causing the buggy to collide with a heavy team, throwing the plaintiff out, and injuring him. It was further alleged that the Common was owned and controlled by the city, and that the firing was licensed by the mayor as agent of the city, under the revised ordinances of 1885, chapter 42, section 14, which provided that "no cannon or artillery shall be fired by the militia or others upon the Common, or other public grounds, unless such firing is authorized by the city council, the mayor, or the commander-in-chief of the militia of the commonwealth." A demurrer to the declaration, on the ground that it did not state a legal cause of action, was sustained, and the plaintiff appealed.

W. K. Richardson and J. T. Wheelwright, for the plaintiff.

A. J. Bailey, for the defendant.

HOLMES, J. We shall not enter upon the discussion to which we were invited by the arguments, as to whether a private land-owner would be liable to travelers upon a highway for the noise caused by the firing of a cannon three times

upon his land by his license. The case of *White v. Jameson*, L. R. 18 Eq. 303, assuming that we should follow it, does not go to the extent of holding a land-owner liable for a transitory act of a third person, the scope of which cannot be enlarged by calling it a public nuisance, and which has in it no element of continuing use of the real estate: See *Butterfield v. Boston*, 148 Mass. 544; *Commonwealth v. Patterson*, 138 Id. 498, 500. But we express no opinion whether the principle of *White v. Jameson*, *supra*, or of *Jackman v. Arlington Mills*, 137 Id. 277, *Dalay v. Savage*, 145 Id. 38, 1 Am. St. Rep. 429, and the cases cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, would extend to the one supposed, because, if it would, we are of opinion that a different principle governs the liability of the city of Boston for the firing of cannon on the Common under a license granted in pursuance of the ordinance set out in the declaration: Revised Ordinances of 1885, c. 42, sec. 14.

The city is alleged to own the Common. But it appears by statutes and decisions, of which we are bound to take notice, that its rights, even at common law, hardly extend beyond a technical title, without the usual incidents of title, and it is equally apparent that the license which it gave was not given by it as an act of ownership, but as an act of municipal government.

"The city holds the Common for the public benefit, and not for its emolument, or as a source of revenue." The use of it is dedicated to and belongs to the public: *Steele v. Boston*, 128 Mass. 583; *Veale v. Boston*, 135 Id. 187; *Abbott v. Cottage City*, 143 Id. 521; 58 Am. Rep. 143. And the legislature has regulated the use very strictly. The city cannot let or sell the Common: Stat. 1854, c. 448, sec. 39. It cannot build upon it except within the narrowest limits: Pub. Stats., c. 54, sec. 16; c. 27, sec. 50; see Stat. 1859, c. 210, sec. 3. It cannot lay out ways over it: Pub. Stats., c. 54, sec. 13. Conversely, the city is not bound to keep it in safe condition, and is not answerable for defects in the paths which cross it: *Steele v. Boston*, 128 Mass. 583; *Veale v. Boston*, 135 Id. 187; see also *Oliver v. Worcester*, 102 Id. 489; 8 Am. Rep. 485; *Clark v. Waltham*, 128 Mass. 567.

These considerations make plainer what is very plain without them, that the ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public,

made by the city under its power to make needful and salutary by-laws, without regard to the accidental ownership of the fee: Stats. 1854, c. 448, sec. 35; *Commonwealth v. Davis*, 140 Mass. 485; see *Commonwealth v. Worcester*, 3 Pick. 462; *Pedrick v. Bailey*, 12 Gray, 161; *Commonwealth v. Curtis*, 9 Allen, 266; *Commonwealth v. Patch*, 97 Mass. 221; *Commonwealth v. Brooks*, 109 Id. 355. Like the ordinance discussed in *Commonwealth v. Davis*, *supra*, its purpose is prohibitory, and the license which it implicitly authorizes (Revised Ordinances of 1885, c. 1, sec. 7) is merely a removal of the prohibition, and of the liability to a penalty which otherwise would be incurred: Revised Ordinances of 1885, c. 1, sec. 5. It makes no difference whether the license is given by the mayor or by the commander-in-chief of the militia: See Stats. 1887, c. 411, secs. 90, 108, 109. In either case, the license is not a permission granted by the agents of the owner, but an adjudication of an exception to a *quasi* statutory rule, made by a person who for that purpose is not the owner's agent. *A fortiori*, the person who fires the cannon is not the city's agent or servant, and the firing is not the city's act.

The case, then, is simply that the city has failed to prohibit, by legislation, the firing of cannon in a public park, or has given its legislative sanction on certain conditions. It has no private interest in the matter, and there is no statute giving an action for such a cause: *Clark v. Waltham*, 128 Mass. 567, 570, and cases *supra*. See *Hutchinson v. Concord*, 41 Vt. 271, 274; 98 Am. Dec. 584; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289. Annoying, and even dangerous, as such firing may be, an adjoining householder could not maintain an action against the city; and the plaintiff stands no better than an adjoining owner would. We do not understand that he seeks to charge the city for a breach of its statutory duty with regard to highways. With regard to that, however, it may be, as to the duty of land-owners, it would be enough to say that the act of the person who fired the cannon was the proximate, or at least a concurring, cause, and that he was not a servant of the city: *Arey v. Newton*, 148 Mass. 598, *post*, p. 604; *Kidder v. Dunstable*, 7 Gray, 104; or, more shortly still, that noises outside the limits of the highway, amounting to a public nuisance, are not a statutory defect in the way: *Hixon v. Lowell*, 13 Id. 59, 63; *Keith v. Easton*, 2 Allen, 552, 555; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Id. 571. For these reasons, without considering other defenses, the de-

murrer must be sustained, and the judgment must be for the defendant.

Perhaps it will save future litigation if we go one step further, and intimate that, as the subject-matter was within the city's authority to regulate by by-law, and as the by-law, so far as appears, is reasonable, those who act under it are justified in doing what we all know extrajudicially to have been done upon the Common time out of mind.

Judgment affirmed.

MUNICIPAL CORPORATIONS. — CITY HAVING AN ORDINANCE PROHIBITING THE USE OF GUN-POWDER, but allowing the mayor to grant permission to use it on certain occasions, is not liable for damages for injury caused by a licensee, in the absence of proof that the authorized act was intrinsically dangerous: *Wheeler v. City of Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837, and see note 838.

CITY AUTHORIZED TO APPROPRIATE MONEY TO CELEBRATE HOLIDAYS, and undertaking a display of fire-works exclusively for the amusement of the citizens, is not liable to one injured by such fire-works through the negligence of the city's servants: *Tindley v. City of Salem*, 137 Mass. 171; 50 Am. Rep. 289; and see *Ball v. Town of Woodbine*, 61 Iowa, 83; 47 Am. Rep. 805. But a municipal corporation was held liable for a personal injury caused by the fright of a horse at a fire kindled in a street, in the conduct of a business, by permission of the corporation: *Town of Rushville v. Adams*, 107 Ind. 476; 57 Am. Rep. 124.

AREY v. CITY OF NEWTON.

[148 MASSACHUSETTS, 508.]

MUNICIPAL CORPORATIONS — DEFECT IN HIGHWAY — HITCHING-POST. —

Hitching-post in highway, in or near the carriage-way, so as to make traveling thereon in carriages unsafe, is a defect for which a city is liable to one who, while so traveling, in the exercise of due care, is injured through the collision of his carriage with it.

MUNICIPAL CORPORATIONS — DEFECT IN HIGHWAY — CONTRIBUTORY NEGLIGENCE. —

City is not liable for injuries sustained by a person traveling in a carriage in the night-time upon a narrow highway, the width of which was known to the driver, through the collision of his carriage with a hitching-post standing between the traveled part of the sidewalk and the carriage-way, while the driver, who was unable to distinguish the line of the sidewalk, was driving upon the sidewalk in violation of an ordinance of the city, in an attempt to pass another carriage going in the same direction.

TORT by Frederick C. Arey, against the city of Newton, to recover damages for personal injuries sustained by the plaintiff from an alleged defect, consisting of a hitching-post in Charles Street. The hitching-post stood in front of the resi-

dence of one Roberts, between the traveled part of the sidewalk and the carriage-way, two inches from the outer edge of a strip or border for grass sloping from the traveled part of the sidewalk towards the carriage-way. The width of the carriage-way from the edge of the slope of the sidewalk where the post stood to the edge of the slope opposite was sixteen and one half feet. The plaintiff and one Woodward were riding in a wagon on Charles Street, Woodward driving to his home, and at the rate of about five miles an hour. As they came near Roberts's house, they overtook an express-wagon, driven by one Dow, who was walking his horses. Dow turned his horses to the right to enable them to get by, and Woodward turned his horse, when the forward wheel of his wagon struck the post, throwing the plaintiff out, and causing the injuries complained of. Ordinances, to which lawful penalties were attached, had been duly passed by the city, forbidding persons from driving upon sidewalks. The plaintiff requested the jury to be instructed: 1. That if the post was an unreasonable obstruction to the way, and the plaintiff while a traveler in the exercise of due care received his injuries through the obstruction, the plaintiff was entitled to a verdict; and 2. That if the traveled part of the way was not of sufficient width to allow the safe passage of Woodward's wagon by Dow, without using a part of the sidewalk, and the night was so dark that the line of the sidewalk was not distinguishable in the exercise of reasonable care, it was not negligence on the part of Woodward, if he was otherwise in the exercise of due care, to have used a part of the sidewalk in attempting to drive by. The judge refused to give the instructions, but instructed the jury that if the post was in the highway, and made the highway dangerous, it was a defect for which the defendant might be held responsible; that if the post was between the carriage-way and the sidewalk, it must have been in such a situation as to have made travel by carriages on the carriage-way unsafe; that if Woodward turned upon the sidewalk to go by, or if he was going at a speed which was in violation of the ordinances of the city, he was doing what he had no right to do, and it would be strong evidence that he was not exercising prudence and caution; but that if between parts of a highway properly adapted to travel by carriages, and parts of the same highway properly adapted to travel on foot, there was an obstruction which caused carriage travel on the carriage-way, or foot travel on the sidewalk to be unsafe and dangerous, such an obstruction

would be a defect for which the city would be responsible to a person who, traveling with due care, is injured thereby. The defendant had a verdict, and the plaintiff alleged exceptions.

C. Q. Tirrell and N. H. Pratt, for the plaintiff.

W. S. Slocum, for the defendant.

FIELD, J. The exceptions are to the refusal to give the two instructions requested. The first instruction requested was given substantially, with the modification that if the post was an obstruction in the carriage-way, or was so near to the carriage-way as to make traveling on it unsafe, then it was a defect; and this, we think, is a correct statement of the law. In the present case, the carriage-way was narrower than in *Macomber v. Taunton*, 100 Mass. 255, but this is the principal difference between the two cases. The narrowness of the part of the way wrought for carriage travel might have some bearing upon the question whether the post was so near to it as to make the carriage-way unsafe, but if the post did not, under the circumstances, constitute a defect in the way intended for carriage travel, the plaintiff cannot recover.

The exceptions state that the ordinances had been duly passed, and that the penalties attached to them were lawful. Woodward had, therefore, no right to drive his wagon upon the sidewalk. If he intentionally and unnecessarily had driven it on the sidewalk, and this was a contributing cause of the injury, the plaintiff could not recover, because the defendant is not liable if the unlawful or negligent act of a third person contributed to the injury: *Rowell v. Lowell*, 7 Gray, 100; 66 Am. Dec. 464; *Shepherd v. Chelsea*, 4 Allen, 113; *Tuttle v. Lawrence*, 119 Mass. 276; *Newcomb v. Boston Protective Department*, 146 Id. 596; 4 Am. St. Rep. 354.

The second request assumes that the traveled part of the way was not of sufficient width to allow the safe passage of Woodward's wagon by that of Dow, while the evidence did not support the assumption, if the words are taken literally. The request was material only in case the jury should find that the post rendered the part of the way wrought for carriage travel unsafe. Undoubtedly, a person driving in a wagon on a dark night, and attempting to pass another wagon driven in the same direction, is more likely to go beyond the limits of the traveled way if it is only sixteen and a half feet wide than if it is twice that width; still, a traveler cannot justify driving upon a sidewalk in violation of an ordinance, merely because

it is convenient in order to pass at a particular place a wagon that is driven before him. If any necessity would justify violating an ordinance of this kind, mere convenience would not: *Commonwealth v. Adams*, 114 Mass. 823; 19 Am. Rep. 862.

Without considering whether an unintentional violation of the ordinance, if it contributed to the injury, would necessarily defeat the action, we think that evidence that Woodward, without being able to distinguish where the line of the sidewalk was, voluntarily undertook to drive by the wagon of Dow on a narrow street, the width of which the jury must have found was known to him, had some tendency to show negligence on his part. The attempt to drive by, under the circumstances proved, may have seemed to the jury careless.

Exceptions overruled.

MUNICIPAL CORPORATION OWES DUTY to those who use its streets to exercise ordinary care to make them safe for passage: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note 39; *Pratt v. Inhabitants etc.*, 147 Mass. 245; 9 Am. St. Rep. 691, and note 697.

CITY IS NOT GUARANTOR of safety of persons using its streets, and such persons must use ordinary care: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

MUNICIPAL CORPORATION IS NOT BOUND TO PROVIDE HITCHING-POSTS, and where it does so, is bound only to ordinary care in the selection and setting of them: *City of Rockford v. Tripp*, 83 Ill. 247; 25 Am. Rep. 281.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ROTHWELL v. ROBINSON.

[39 MINNESOTA, 1.]

CORPORATIONS. — ORDINARILY, REDRESS FOR WRONG TO CORPORATE RIGHT OR PROPERTY MUST BE SOUGHT in the name of the corporation, and a stockholder cannot sue for the damage to him individually, unless the corporate authorities refuse to act when applied to by him. But when the wrong-doers are the managers and majority of the stockholders, who have diverted the corporation and its assets and business from their legitimate purposes to the private use and benefit of one of such majority, a minority stockholder may sue for redress without application to have suit brought in the name of the corporation.

ACTION by Joseph Rothwell, a minority stockholder, against C. H. Robinson and others, managers and majority stockholders, to obtain redress for a wrongful diversion of the corporation assets and property. The defendants appealed from an order overruling their demurrer to the plaintiff's complaint.

Flandrau, Squires, and Cutcheon, for the appellants.

C. D. O'Brien, for the respondent.

GILFILLAN, C. J. There are a good many allegations in the complaint that are no ground for a court to afford any relief to plaintiff, — that amount indeed to no more than expressions of discontent on the part of a stockholder in a corporation at being excluded by the majority of the stock from the management of its business, and at the business being conducted in a manner not approved by him. But the allegations that the defendant Robinson (who, as is alleged, is therein aided by the defendants Hemenway and Dunn, the stock being

all held by plaintiff and those three) has employed the business of the corporation for the benefit of a partnership of which he was a member, exposing said business to great loss and detriment, and that he has used the machinery, employees, and material of the corporation in extensive private experiments of his own, and in making and experimenting with divers and sundry devices of different descriptions, and different kinds of machinery, which he claims to have invented himself, but which are of no use to anybody, and has caused said work to be done and experiments to be made at the expense of the corporation, and without payment or remuneration therefor, and has thereby wasted and depreciated the assets of the corporation, show a diversion of the corporation and its assets and business from their legitimate purposes to the private use and benefit of one of the stockholders. It would be strange if the courts could afford no relief against such violations of the good faith which stockholders in a corporation owe to each other, and which the managers owe to the stockholders. That redress will be afforded the minority stockholders for the misappropriation of corporation property by the majority stockholders, or the managers, is illustrated in the case of *Jones v. Morrison*, 31 Minn. 140.

Ordinarily, redress for a wrong to corporate rights or property must be sought in the name of the corporation, and a stockholder cannot sue for the damage to him individually, unless the corporate authorities refuse to act when applied to by him. But that rule cannot apply to a case like this. Here the wrong-doers are the managers and majority of the stockholders of the corporation. An application by plaintiff to them to prosecute the wrong would be an application to bring suit against themselves in the name of the corporation. So absurd a requirement cannot be imposed on plaintiff as a condition of affording relief for so clear a wrong.

Order affirmed.

CORPORATIONS. — INDIVIDUAL STOCKHOLDER MAY MAINTAIN EQUITABLE ACTION AGAINST the directors for misconduct in office when the corporation itself is unable, or, through fraud or collusion, omits to sue; and when the directors are charged with fraud, it is not necessary for the stockholder to apply to them for the use of the corporate name in bringing the suit: *Musina v. Goldthwaite*, 34 Tex. 125; 7 Am. Rep. 281; and, to the same effect, see *March v. Eastern R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 732, and note 751.

CORPORATIONS — ACTIONS BY STOCKHOLDERS AGAINST THE CORPORATION. — A stockholder may maintain an action in its behalf against the directors for an accounting and recovery by the corporation of moneys belonging to it,

which had been fraudulently misappropriated by the directors: *Beach v. Cooper*, 72 Cal. 99. A stockholder may sue to restrain the corporation from acts done in excess of its corporate authority: *Teachout v. Des Moines etc. Ry Co.*, 75 Iowa, 722. *Mandamus* lies at the instance of a stockholder to compel an inspection of the corporation books: *Foster v. White*, 86 Ala. 467. The corporation is a necessary party to an action by less than one third of the stockholders, under the West Virginia code, who desire to wind up its affairs and obtain a decree of dissolution, etc.: *Hurst v. Cole*, 30 W. Va. 158. But before a suit for redress of grievances will be entertained on behalf of stockholders against the corporation, the directors, or the corporate officers, the stockholders must have exhausted all means within their reach to obtain redress within the corporation itself: *Boyd v. Sims*, 87 Tenn. 771; and the facts, that the officers of a corporation have refused to allow a stockholder to inspect the books, that it was losing in its business, and that the directors had levied an assessment for the purpose of compelling the stockholder to dispose of his stock, are not sufficient to entitle such stockholder to sue for a dissolution of the corporation: *Burham v. San Francisco etc. Co.*, 76 Cal. 24.

HARDENBERGH v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY COMPANY.

[39 MINNESOTA, 2.]

COMMON CARRIERS — PASSENGER'S RIGHT TO A SEAT. — A passenger on a railway train may rightfully refuse to pay fare unless provided with a seat, and he does not become a trespasser on the train by so refusing; and the company is bound to afford him a reasonable opportunity to leave the train.

COMMON CARRIERS — EJECTION OF PASSENGER. — A railroad company having the right to eject from its train one not a trespasser must do so at a regular station. But a trespasser may be ejected at a place other than a station, provided he is not wantonly exposed to peril of serious personal injury.

ACTION to recover damages for having been ejected from one of the defendant's passenger trains. The facts appear in the opinion.

Selden Bacon, for the appellant.

Benton and Roberts, for the respondent.

GILFILLAN, C. J. Defendant was a common carrier of passengers for hire, maintaining and operating for that purpose a line of railway from Minneapolis to Wayzata, on Lake Minnetonka. The plaintiff, for the purpose of going from Minneapolis to Wayzata, entered, at the former place, one of defendant's regular passenger trains for the latter place, which immediately started, and before plaintiff could look through the cars in the train to find a seat, it was going at a

high rate of speed. Upon looking through the train, he could find no seat vacant. At the first opportunity, he applied to the conductor to furnish him a seat, and the conductor (as we assume, because the seats were all filled) refused to provide him one. The conductor then demanded his fare, which the plaintiff offered to pay if supplied with a seat, but refused to pay unless supplied with a seat. Up to this the train had made no stop. The conductor then stopped the train, and forcibly put the plaintiff off at a place distant from any dwelling-house, more than two miles distant from any flag-station, and more than five miles distant from any regular station of defendant. No complaint is made that the conductor, if he had a right to eject plaintiff, used more than the proper amount of force. The only question is, Had the conductor a right, under the circumstances, to put plaintiff off at the place where he did,—that is, out in the country, at a distance from any station?

In the case of a trespasser on a train,—that is, a person wrongfully upon it, as where he enters it intending not to pay the fare, or where he wrongfully refuses to pay the fare when properly demanded,—the conductor is not required to put him off at one place rather than another, provided he do not wantonly expose him to peril of serious personal injury. With that qualification, he may put him off at a place other than a station, and is not required to consider his mere convenience: *Wyman v. Northern Pacific R. R. Co.*, 34 Minn. 210.

This plaintiff, however, was not wrongfully on the train. It is, in general, the duty of a railroad company to provide sufficient cars to carry all who have occasion to travel on its line of road. As the law does not require unreasonable things, a single instance, or occasional instances, of insufficiency in the amount of means to travel, caused by a rush of travel not reasonably to be expected by the company, would probably be excused; and the railroad company, like all other common carriers of passengers, must provide those whom it carries with the usual reasonable accommodations for comfort in traveling, including seats. This is too well established to need citation of authorities. When this plaintiff, desiring to take passage to Wayzata, found one of defendant's regular passenger trains about to start for that place, he had a right to enter it, assuming that the defendant had done its duty in providing sufficient and suitable accommodations for all having occasion to become passengers on the train. The train started, and

had reached a high rate of speed before he learned that there was not sufficient seats. When he learned that he could get no seat, he had a right to elect either to accept such accommodations as were offered, and pay the fare, or to refuse to pay the fare unless he could have the accommodations to which a passenger is entitled. If he elected the latter course, then (inasmuch as he was not entitled to the passage, even though no seat was provided him, without paying fare) it was his duty to leave the train on the first reasonable opportunity afforded him. He could not be expected to leave the train while in motion. A reasonable opportunity to leave it would have been the stopping it in a suitable and reasonable place. As he had a right to refuse to pay fare unless a seat was provided him, he did not become wrongfully on the train by so refusing. He could become a trespasser only by refusing to leave the train on a reasonable opportunity being afforded. Such opportunity the defendant was bound to afford, unless it chose to carry him without fare. It was the defendant's, not the plaintiff's, fault that a seat was not provided.

The case differs from the Wyman case, for in that case the refusal to pay fare was wrongful; in this, the refusal unless a seat was provided him was rightful. In that case, the plaintiff, by the refusal, became a trespasser; in this, he did not. This case is somewhat analogous to *Maples v. New York etc. R. R. Co.*, 38 Conn. 557, 9 Am. Rep. 434, in which it was laid down that a railroad company, having a right to eject from its train one not a trespasser, must do so at some regular station on its road. That is a reasonable rule; and that the decision was in accordance with the general rule was recognized by this court in the Wyman case. See also *Gallena v. Hot Springs R. R. Co.*, 13 Fed. Rep. 116.

Order reversed.

DUTY OF CARRIER BY RAILWAY TO FURNISH PASSENGER WITH SEAT: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627; 4 Am. St. Rep. 776, and note 779.

TRESPASSER MAY BE EJECTED FROM RAILWAY TRAIN AT PLACE OTHER THAN DEPOT OR STATION, provided care is taken not to expose his person to serious injury or danger: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780, and note 794; and whether he was so ejected or not is a question of fact for the jury: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542.

POWER OF PASSENGER CARRIER TO EJECT PASSENGER FOR REFUSAL TO PRODUCE HIS TICKET or to pay fare: See *International etc. R. R. Co. v. Wilkes*, 68 Tex. 617; 2 Am. St. Rep. 515, and cases collected in note 541.

ROGERS v. BENTON.

[39 MINNESOTA, 39.]

MORTGAGEE'S ABORTIVE ATTEMPT TO FORECLOSE BY ADVERTISEMENT DOES NOT DESTROY LIEN OF MORTGAGE, or cut off the right to resort to foreclosure by action. The two modes of foreclosure are cumulative.

MORTGAGES. — THOUGH ATTEMPTED FORECLOSURE BE ABORTIVE AND INEFFECTUAL, AS SUCH, IT MAY TAKE EFFECT AS TRANSFER of the rights of the mortgagee to the purchaser at the sale, and to those who claim under him by conveyance of the interest in the premises apparently acquired by such purchaser at the foreclosure sale.

MORTGAGES. — TO CONSTITUTE "MORTGAGEE IN POSSESSION," he must be in possession by reason of the agreement or assent of the mortgagor or owner of the fee that he have the possession under and because of the mortgage. The assent need not necessarily be express, but may be implied from circumstances.

MORTGAGES — MORTGAGEE IN POSSESSION — ACTION TO REDEEM, WHEN BARRED. — The purchaser at a defective foreclosure sale, or his assign, who goes into possession of the mortgaged premises with the assent of the mortgagor, under the rights supposed to have been acquired under such sale, will be deemed a "mortgagee in possession." An action by the mortgagor to redeem must be brought within ten years from the date of the entry of the mortgagee into possession; otherwise, the right of action to redeem will be barred.

MORTGAGES — EFFECT OF POSSESSION UNTIL RIGHT TO REDEEM IS BARRED. — Where the holder of the mortgage has gone into possession as "mortgagee in possession," and so remains (the mortgage being unpaid) until the right of action to redeem is barred, he becomes vested with an absolute legal title to the mortgaged premises.

MORTGAGES — MORTGAGEE IN POSSESSION — RIGHTS NOT AFFECTED BY TEMPORARY ABSENCE. — Where possession is surrendered by mortgagor to mortgagee, and actual possession is taken by the latter, who, during ten years thereafter, has done nothing indicating an intention to abandon it, or to restore it to the mortgagor, and the mortgagor has not re-entered or asserted any right to do so, the mere fact that the mortgagee temporarily omitted to actually occupy the premises during a portion of the ten years will not affect his rights as "mortgagee in possession." Under such facts, the possession must be deemed to have continued all the time in him.

ACTION to remove cloud from title. The facts appear in the opinion.

Warren H. Mead, for the appellants.

Clark, Eller, and How, for the respondents.

MITCHELL, J. The principal questions in this case are, What constitutes "a mortgagee in possession"? and, What are his rights? The facts as found by the court, so far as here material, are, that one Edwin K. Benton, being the owner of a tract of land containing 240 acres, he and his wife, defendant Elis-

abeth Benton, in December, 1857, executed a mortgage upon it to William and James Chaffee, to secure the payment of one thousand dollars in one year. Benton resided on the land until the fall of 1866, when he left the state, and went to the state of Connecticut, where he continued to reside until his death, October 3, 1878, his wife and children continuing, however, to reside on the premises until March, 1876. In July, 1874, W. B. Conant, the assignee of the mortgage, proceeded to foreclose by advertisement under a power of sale, and at the mortgage sale, August 22, 1874, bid in the land, and obtained a sheriff's certificate of sale. No redemption having been made, in February, 1876, Conant demanded possession as owner under the mortgage sale from the defendant, Elizabeth Benton, who, in compliance with the demand, removed from and vacated the premises in March, 1876. In February, 1876, Conant and wife had quitclaimed the premises to one Mills, who, on the same day, quitclaimed them to Mrs. Conant. On the first day of June, 1876, Mrs. Conant and family entered into possession of the whole of the premises peaceably and in good faith, claiming to be the owner; and she, and those claiming under her, have ever since, without objection from any one, remained in the actual, continuous, and peaceable possession of the premises until in August, 1887; except that, as the court finds, the south eighty acres, which had been conveyed by the Conants to the plaintiff Dodge, has not been actually occupied by any one since March, 1885; this part of the land, as the evidence discloses, being unimproved, and the house upon it having been burned. On the 27th of August, 1887, the defendant Elizabeth Benton, having obtained a quitclaim from the heirs of Edwin K. Benton, intruded herself into some rooms in the dwelling-house on the north eighty acres occupied by the tenant of plaintiff Rogers. So far as appears, this was the first time either she or any of the heirs of Benton made any claim to the premises since they vacated them in March, 1876. It is not claimed that the mortgage from Benton to the Chaffees has ever been paid. The plaintiffs claim through certain mesne conveyances under Mrs. Conant,—the plaintiff Rogers the north one hundred and sixty acres, and the plaintiffs Dodge and Hall the south eighty. It is conceded that the foreclosure by Conant, in 1874, was abortive, the time for foreclosure under the power of sale having previously expired: Laws 1871, c. 52. Plaintiffs claim, however, that it was in 1876 still a live mortgage, that might have been foreclosed by

action, and that they, and those under whom they claim, occupied the position of mortgagees in possession, whose rights had, prior to August, 1887, ripened into title by the expiration of the time within which the mortgagor, or those claiming under him, might have brought an action to redeem.

Defendants' first position is, that Conant, having elected to foreclose by advertisement, could not afterwards have foreclosed by action, and therefore that the mortgage was extinguished and dead before the Conants entered into possession, in June, 1876. That the two modes of foreclosure are cumulative, and that a void attempt to foreclose by advertisement does not destroy the lien of the mortgage or cut off the right to resort to foreclosure by action, is too well settled to admit of discussion: *Folsom v. Lockwood*, 6 Minn. 119 (186); *Lash v. McCormick*, 17 Id. 381 (403). Neither is there anything in the point that evidence of any such right was inadmissible under the complaint. It is true that it alleges a valid foreclosure, and asserts title under it; but it alleges all the facts necessary to entitle plaintiffs to the rights of mortgagees in possession, if the evidence warrants it.

This brings us to the first important legal question in the case, viz., whether the right to foreclose by action still continued when the Conants went into possession, June 1, 1876. This cause of action accrued against Benton in December, 1858, and under the laws of 1870, chapter 60, would have been barred September 8, 1870, unless saved from the operation of the statute by his departure from and residence out of the state. It has been determined that the exception in General Statutes 1866, chapter 66, section 15, from the time limited for commencing actions, of the time during which the defendant resides out of the state, applies to an action to foreclose a mortgage upon real estate: *Whalley v. Eldridge*, 24 Minn. 358. We need not here discuss the nature of the absence from the state on part of a defendant necessary to prevent the statute from running. The evidence abundantly justified the court in finding that in this case it was permanent in its nature, and that Benton resided in Connecticut from the time of his departure, in 1866, until his death, in 1878. The fact that he never returned during these eleven years, and that in his will, executed shortly before his death, he described himself as of East Windsor, Connecticut, abundantly justified the conclusion that his absence was a permanent change of residence, and if so, it was of no legal importance that his family re-

mained behind. The fact that Conant might, notwithstanding the non-residence of the mortgagor, have resorted to substituted service of the summons, would not take the case out of the statutory exception. The right to foreclose by action, therefore, still existed when the Conants entered into possession.

Though the foreclosure was ineffectual as such, yet, under the facts of this case, by the deeds from Conant to Mills, and from Mills to Mrs. Conant, of the interest apparently acquired by Conant as purchaser at the foreclosure sale, Mrs. Conant became the owner of the mortgage: *Johnson v. Sandhoff*, 30 Minn. 197; *Holton v. Bowman*, 32 Id. 191. The question is, Did she acquire possession of the premises under such circumstances as to make her "a mortgagee in possession"?

The law as to what constitutes "a mortgagee in possession" has not been so clearly defined by the decisions as it might be. Sometimes the subject is referred to as if all that is necessary is, that the mortgagee should be in possession in fact, regardless of the mode of acquiring it. Sometimes a mortgagee in possession is spoken of as one who has acquired possession "peaceably," or again, "lawfully." At common law, a mortgage conveyed the legal title, defeasible upon payment of the mortgage, and upon breach of the condition the mortgagee became at once entitled to the possession of the mortgaged premises, and having this right, could maintain an action of ejectment. But this has been changed by statute which provides that a mortgage of real property is not to be deemed a conveyance, so as to enable the mortgagee to recover possession without foreclosure: Gen. Stats. 1878, c. 75, sec. 29. It was difficult for the courts at first to free themselves from their old ideas of the nature of a mortgage, or to realize the full extent of the change wrought by this statute. They still clung to the idea that a mortgage conveyed the legal title, and gave this statute an absolutely literal construction. They seemed to think that the mortgagee, after condition broken, still had the right of possession, but that the statute merely forbade its legal enforcement. Hence, if he could only somehow get possession, he could maintain it on common-law principles. Any such doctrine is utterly inconsistent with all legal principles. If a mortgagee in possession can insist on maintaining it, his right must depend upon his contract, and must be capable of enforcement: *Newton v. McKay*, 30 Mich. 880. The legislature, by the statute referred to, doubtless

intended to sweep away every remaining vestige of the ancient common-law rule, which regarded a mortgage as a conveyance of the title, and to make it a mere chattel,—a lien; the fee and right of possession remaining in the mortgagor both before and after condition broken: *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145. This court, although at first not entirely emancipated from the old ideas as to the nature of a mortgage,—see *Pace v. Chadderdon*, 4 Minn. 390, 499,—has subsequently, by numerous decisions, planted itself squarely upon this doctrine: *Adams v. Corrison*, 7 Id. 365, 456; *Donnelly v. Simonton*, 7 Id. 110, 167; *Berthold v. Holman*, 12 Id. 221, 335; *Spencer v. Levering*, 8 Id. 410, 461; *Loy v. Home Ins. Co.*, 24 Id. 315; 31 Am. Rep. 346.

It follows necessarily from this that a mortgagee, even after condition broken, has no right or remedy except to foreclose his mortgage; that he cannot, merely under his mortgage, either recover or maintain possession of the mortgaged premises. The only logical rule is, that, to constitute “a mortgagee in possession,” the mortgagee must be in possession by reason of the agreement or assent of the mortgagor, or his assigns, that he have the possession under the mortgage and because of it. The right to take possession under his mortgage being taken away, nothing remains but to foreclose, or else make some arrangement for his better security with the owner of the fee. Having no right to take possession under his mortgage, the mortgagee can get none, except by the agreement or assent of the one who owns that right. This, of course, need not necessarily be express. It may be implied from circumstances. Where the mortgagor expressly abandons possession, his assent that the mortgagee might go into possession under his mortgage might well be implied, especially when he allows him to remain in possession for a considerable length of time without objection. But, after all, the assent, express or implied, of the mortgagor, that the mortgagee may take possession under or because of his mortgage, is of the essence of “a mortgagee in possession.”

This assent is conclusively proved in the present case. Benton, by his permanent removal from the state, abandoned all personal occupancy or possession. Conant demanded the possession from Mrs. Benton under his mortgage, or by virtue of rights supposed to have been acquired under its foreclosure. She surrendered possession in pursuance of that demand, knowing, as she herself testifies, that Conant was coming in

under the mortgage, and that her husband knew it too; and after this entry, the Conants, and those claiming under them, were allowed to remain in possession over ten years, without objection or assertion of any right in themselves by the mortgagors, or any one claiming under them. The fact that Conant claimed the right to the possession under his foreclosure, and threatened legal proceedings to obtain it, and that Mrs. Benton may at that time have supposed that he had that right, does not alter the legal aspect of the case, or render Mrs. Benton's act any the less a voluntary surrender of the possession to Conant as mortgagee. Mrs. Conant, and those claiming under her, had therefore the rights of "mortgagees in possession." The right to foreclose and the right to redeem being reciprocal and commensurable, the time within which an action to redeem must be brought is, in analogy to the statute limiting the time for commencing an action to foreclose, ten years: *Holton v. Meighen*, 15 Minn. 50, 69, 80; *King v. Meighen*, 20 Id. 237, 264; *Parsons v. Noggle*, 23 Id. 328; *Fisk v. Stewart*, 26 Id. 365. The right of action to redeem on part of Benton accrued not later than June 1, 1876, and hence expired certainly not later than June 1, 1887, assuming that the time was extended one year under General Statutes 1878, chapter 66, sections 18, 19, on account of his death. The time in which to bring this action was not extended by reason of Benton's own absence from the state: *Parsons v. Noggle*, *supra*.

While, perhaps, we have never distinctly so held (see *Meighen v. King*, 31 Minn. 115), yet the necessary and logical result of our decisions is, that where the holder of the mortgage has gone into possession as "mortgagee in possession," and so remains (the mortgage being unpaid) until the right of action to redeem is barred, he becomes vested with an absolute legal title to the mortgaged premises. Such was the position of the plaintiffs in this action at and prior to the time that defendant Elizabeth Benton intruded herself into the premises in dispute, on the 27th of August, 1887. Of this there can be no question, as to the 160 acres claimed by the plaintiff Rogers. The fact that plaintiffs Dodge and Hall have not actually occupied or lived upon their eighty acres since the spring of 1885, cannot, under the facts of this case, make any difference. They have done nothing indicating an intention to abandon their possession, much less of restoring it to the mortgagor or his heirs. Their ceasing to retain the *pedis possessionem* was merely incident to the unimproved and untenable condi-

tion of the premises. They continued to pay taxes on them as their property. The possession having been surrendered by the mortgagors in 1876 to the Conants as mortgagees, and neither the Conants nor those under them having done anything indicating an intention to abandon the possession or restore it to the mortgagors, and the latter not having re-entered, or asserted any right to do so, within ten years, we do not think that the mere fact that the mortgagees have temporarily omitted to actually occupy the premises would have the effect of restoring the possession to the mortgagors, or of in any manner affecting the rights of the plaintiffs as mortgagees in possession. Under the facts, the possession must be deemed to have continued all the time in the plaintiffs.

Order affirmed.

TITLE AND RIGHT OF POSSESSION OF LAND ARE IN MORTGAGOR, and so continue until divested by a sale and deed under foreclosure proceedings; and a grantee of the mortgagor before foreclosure acquires the same rights: *Grether v. Clark*, 75 Iowa, 383; 9 Am. St. Rep. 491, and note 494. See *Cotton v. Carlisle*, 85 Ala. 175; 7 Am. St. Rep. 29, and note 31.

FORECLOSURE OF MORTGAGE BY ADVERTISEMENT, when a nullity: *Bauman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661.

MORTGAGEE IN POSSESSION — DUTIES AND LIABILITIES OF: *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62, and note 73; *Caldwell v. Hall*, 49 Ark. 508; 4 Am. St. Rep. 64, and note 69.

THOMPSON v. SCHEID.

[89 MINNESOTA, 102.]

CHattel Mortgages — UNAUTHENTICATED CERTIFICATE OF ACKNOWLEDGMENT IS WITHOUT LEGAL EFFECT. — Where a chattel mortgage purports to have been acknowledged before a notary public, but the certificate of acknowledgment is not authenticated by a notarial seal, such certificate is incomplete, and not properly authenticated, and the filing of the mortgage is not any notice under the provisions of Minnesota General Statutes 1878, chapter 39, section 3, to subsequent purchasers or mortgagees in good faith.

REPLEVIN — DAMAGES. — ONE WHO HAS RIGHT TO USE OF PERSONAL PROPERTY IS ENTITLED TO RECOVER the value of such use as special damages for the detention of the property. But this rule applies only where the party has the right to the use, and a mortgagee, after default, has a right to the possession only for the purpose of foreclosure or sale under the mortgage, in order to satisfy the debt secured thereby, and not for the purpose of using the property.

REPLEVIN. — **IN REPLEVIN, RIGHT OF PARTY TO ALTERNATIVE JUDGMENT** for the value of the property, in case the property itself cannot be obtained, is exclusively for his own benefit, which he may waive if he chooses, and take judgment merely for the return of the property.

F. B. Wright, and Knappen and Wright, for the appellant.

Robinson and Baker, for the respondent.

MITCHELL, J. Action in replevin to recover a span of horses. Both parties claim through one Geibenhain, — the defendant under a mortgage executed to Glynn and Robinson, July 8, 1886, and filed the next day; the plaintiff under a mortgage executed August 11, 1886, and filed the same day. The property remained in the possession of Geibenhain, the mortgagor, until December 18, 1886, when it was sold under the first mortgage, and purchased at the sale by one Jonas, who afterwards sold and delivered it to defendant. Both mortgages were executed in good faith and for a valuable consideration. When plaintiff's mortgage was executed, he had no actual notice of the prior one, through which defendant claims. The first mortgage purported to have been acknowledged before one Coffin as notary public, but the certificate of acknowledgment was not authenticated by a notarial seal; none being, as the court finds, "attached to the signature of said Coffin on said acknowledgment." We are compelled to hold that the case must follow *De Graw v. King*, 28 Minn. 118, and *Coleman v. Goodnow*, 36 Id. 9; 1 Am. St. Rep. 632. General Statutes of 1878, chapter 26, section 3, provides that each notary shall provide himself with the proper official seal, with which he shall authenticate his official acts. General Statutes of 1878, chapter 39, section 3, provides that no mortgage shall be notice of any fact, as against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith, unless the same is acknowledged before some officer authorized to take the acknowledgment of deeds. The acknowledgment includes the due certificate of the fact by the officer taking the same. Without his seal, the notary's certificate is incomplete, and not properly authenticated. Hence the filing of such a mortgage would not, under the statute, be notice of any fact to a subsequent purchaser or mortgagee.

2. The complaint alleges that the value of the use of the property during the time it was in defendant's possession was the sum of fifty dollars, and that plaintiff had been damaged

in that sum by the unlawful detention. Plaintiff introduced no evidence on the subject, but defendant himself proved that the use of a team was worth from four to five dollars per day. If this was enough to make out a case for plaintiff to entitle him to recover such damages, the evidence would have been just as available to him as if introduced by himself. We have held that the owner of property who is entitled to its use may recover the value of such use as special damages for its detention: *Ferguson v. Hogan*, 25 Minn. 135. But this applies only where the party has the right to the use: Wells on Replevin, sec. 580; *McArthur v. Howett*, 72 Ill. 358. In this case the plaintiff was a mere mortgagee, whose mortgage had not been foreclosed, and in which there had been no default until the date of the commencement of the action. As mortgagee, he had the legal title, and after default the right to the possession of the property, but only for the purpose of foreclosure or sale under the mortgage in order to satisfy the amount of his mortgage, three hundred dollars, and about one year's interest at six per cent; and this was the extent of the value of his interest in the property. He was in no position to use the property. There was nothing in either the complaint or the evidence to entitle plaintiff to recover any such special damages.

3. The complaint alleged the value of the property to be \$350. This was put in issue by the denial in the answer: *German-American Bank v. White*, 38 Minn. 471. No evidence was introduced on the subject, and hence the finding of the court that the value of the property was \$350 is unsupported by the testimony. But the right to an alternative judgment for the value, in case the property itself cannot be obtained, is exclusively for the benefit of plaintiff, which he may waive if he chooses: *Stevens v. McMillin*, 37 Minn. 509; *Morrison v. Austin*, 14 Wis. 601. If, therefore, plaintiff will remit his damages for the use of the property, and waive his right to an alternative judgment for its value, and consent to take judgment merely for the return of the possession, a new trial will not be necessary: *Ward v. Anderberg*, 36 Minn. 300. The cause is therefore remanded, with instructions to the court below to grant a new trial, unless plaintiff will remit the damages for the detention of the property, and waive any judgment in the alternative for its value, and consent to take judgment merely for the return of the property and costs of suit; but, if he files such release and waiver, then to enter judgment in his

favor on the findings for the return of the possession and for costs.

Ordered accordingly. —

MORTGAGE MUST BE LEGALLY RECORDABLE AND DULY RECORDED according to law to make the record thereof constructive notice: *Hibbard v. Zenor*, 75 Iowa, 471; 9 Am. St. Rep. 497, and note 503.

COURTS CANNOT DISPENSE WITH SUBSTANTIAL COMPLIANCE WITH STATUTE, and by intendment supply important words omitted in the certificate of acknowledgment of a mortgage: *Jacoway v. Gault*, 20 Ark. 190; 73 Am. Dec. 494, and note 497.

CERTIFICATE OF ACKNOWLEDGMENT TO CHATTEL MORTGAGE, sufficiency of: *Souiden v. Craig*, 26 Iowa, 156; 96 Am. Dec. 125.

MEASURE OF DAMAGES IN REPLEVIN: *Herdie v. Young*, 55 Pa. St. 176; 93 Am. Dec. 739, and note 744; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243; *Peters etc. Co. v. Lesh*, 119 Ind. 88; *ante*, p. 367, and note.

REPLEVIN, ALTERNATIVE JUDGMENT IN: *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98.

MORTGAGES — RECORD AND ACKNOWLEDGMENT. — A mortgage was valid and properly recorded when the notary used another's seal unlike his own in making the acknowledgment: *Muncie Bank v. Brown*, 112 Ind. 474. In the absence of a statutory provision as to a form of acknowledgment as to chattel mortgages, an acknowledgment is sufficient where it shows that the mortgagor appeared before the acknowledging officer in person, and acknowledged the instrument to be his act and deed: *Brunswick etc. Co. v. Brackett*, 37 Minn. 58.

COUNTY OF PINE v. WILLARD.

[89 MINNESOTA, 125.]

OFFICE AND OFFICERS — COUNTY TREASURER — LIABILITY OF SURETIES ON OFFICIAL BOND OF. — A county treasurer held the office for two successive terms, and failed at the end of the second term to account for or turn over to his successor all of the funds then properly chargeable to him. In such case, the sureties upon his bond for the second term are *prima facie* responsible for the deficiency; and if they would relieve themselves from liability upon the ground that the deficiency occurred during the previous term, the burden is cast upon them to show that fact.

OFFICE AND OFFICERS. — SURETIES OF COUNTY TREASURER FOR HIS SECOND TERM OF OFFICE ARE RESPONSIBLE for money coming into the treasury during that term, although it was placed there by the officer merely to cover a defalcation of the preceding term held by him. So they would be responsible if the funds received during the second term were misapplied to cover a prior delinquency.

OFFICE AND OFFICERS. — OFFICIAL BOND OF COUNTY TREASURER FOR SECOND TERM IS NOT AVOIDED by the fact that the board of county commissioners knew when they accepted the bond that the officer had converted funds during the prior term.

ACTION by the board of county commissioners against D. L. Willard, county treasurer, and the sureties upon his bond. The facts appear in the opinion. The judgment was for the plaintiff, and the defendants appealed.

Fayette Marsh, for the appellants.

L. H. McCusick, for the respondent.

DICKINSON, J. The defendant Willard was treasurer of Pine County from the 1st of March, 1877, until about the 1st of December, in that year, when he resigned. He had also been the treasurer for the immediately preceding term. The other defendants were sureties upon Willard's official bond for the term commencing in March, 1877. This action was brought to recover for an alleged defalcation during the second term. Upon a trial of the cause, the court found a deficiency of \$875.15, for which, with interest from December 1, 1877, the defendants were held to be liable. It is contended that the evidence did not justify the finding that this defalcation occurred during the second term of the officer, for which alone these sureties are responsible; but that it, or at least the greater part of it, occurred during the previous term. In December, 1877, Willard ceased to hold the office, and it was then transferred to a successor. The evidence abundantly justified the conclusion that he did not then account for or turn over to his successor the funds chargeable to him, and that there was then a deficit in the funds belonging in the treasury, to an amount at least equal to that found by the court. This made a case for a recovery against these defendants, unless at least it affirmatively appeared that the funds thus deficient had not been received during this second term, and had not been in the treasury during that period, the burden being thus cast upon the defendants to overcome the *prima facie* case which was made out by proof of the default to account for the funds belonging in the treasury, and properly chargeable against him at that time: *Kelly v. State*, 25 Ohio St. 567; *Bruce v. United States*, 17 How. 437; *Hetten v. Lane*, 43 Tex. 279. It is not supposed, however, that these sureties would be chargeable if all of the funds received during the second term, or which at any time during that term had been in the treasury, had been properly disbursed or accounted for.

There is evidence going to show that Willard, during his former term, as well as during the second term, misappropriated the public funds, and that never after June, 1876, did

he have in the treasury the funds belonging there. It appears that no bank or other depository was ever designated by the proper officers of this county for the deposit of public funds, as prescribed by chapter 38, laws of 1873. It also appears that Willard was accustomed to deposit such funds in certain banks in the city of St. Paul to the credit of "Don L. Willard, treasurer of Pine County"; and, as appears by his own testimony, that he used such funds the same as he did his own. Considering such testimony, in connection with what is shown as to the amounts of money received by Willard as treasurer during his second term, we think that the court was justified in its conclusion that Willard had misappropriated and failed to account for funds received during this second term to the extent of at least \$875.15. That Willard misappropriated funds during that term to a far larger amount, seems, from his own testimony, to be most probable; for it was a conversion and embezzlement of the trust funds to deposit them to his own credit, so as to be undistinguishable from his private funds, and to use and treat such deposits as though it had been private property. The proofs were not such as to require the court to adopt the conclusion that the deficit found to exist in December, 1877, was referable to a period prior to the then current term, and that the funds coming into the treasurer's hands during the latter term had been faithfully kept and disbursed. The evidence tended to establish a contrary conclusion. There is some evidence tending to show that Willard made good the deficit with respect to his former term; and if in fact the money was in any way brought into the treasury, even though it was intended to be and was afterwards again abstracted, these defendants would be responsible therefor: *Parker v. Medsker*, 80 Ind. 155; *Goodwine v. State*, 81 Id. 109; *Ingraham v. Maine Bank*, 13 Mass. 208. And even if the prior defalcation were not made good by repayment of money into the treasury for that purpose, it would not necessarily follow that this deficit, found to exist at the close of Willard's incumbency, is referable to the preceding term, so that these sureties would not be responsible. If the funds received during the second term were misapplied to make up for a prior delinquency, these sureties would be liable for that misapplication: *Gwynne v. Burnell*, 7 Clark & F. 572; *Inhabitants of Colerain v. Bell*, 9 Met. 499. To illustrate, by an hypothesis suggested by Willard's conduct during his second term, we will suppose that during the former term Willard, being out of

public funds by reason of his embezzlement, gave post-dated checks upon his banker in payment of official warrants presented for payment, and which he thus took up and held as vouchers, as though they had been paid out of public funds. Suppose then, that to meet such outstanding checks he afterwards deposited to his account public moneys received during his second term. This would be in effect a use of such funds to pay his own personal obligation, and for that these sureties would be answerable. From the evidence, and in view of the fact that Willard's course of embezzlement and conversion appears to have continued without change, it seems quite as probable that whatever deficit there may have been during the first term was covered by some such or like means, as that it had remained and been carried over as a deficit into and through the second term. Our conclusion is, that while it is not entirely certain from the evidence whether the whole of this deficit was of funds received during the second term, yet the finding of the court was justified by the evidence.

The appellants admit and claim that the deposit of the funds, as above indicated, in itself constituted an embezzlement, and they contend that, inasmuch as the county commissioners knew that Willard had so kept the public money during the prior term, it was a fraud upon these sureties to accept their bond, and that this avoided the bond. This position cannot be sustained. If the board did know that Willard had embezzled money during the former term, they were under no obligation to voluntarily warn these defendants, nor to protect them from Willard's possible dishonesty in the future, by declining to accept their tendered suretyship. If the bond was sufficient, it was their duty to accept it.

Judgment affirmed.

APPLICATION OF PAYMENTS BY PUBLIC OFFICER IS BINDING ON HIS SURETIES, and they cannot escape liability for his failure to pay over money collected during the term for which they were sureties, by showing that he wrongfully applied such moneys to the payment of deficiencies occurring during the preceding term: *Crown v. Commonwealth*, 84 Va. 282; 10 Am. St. Rep. 839, and extended note 843-860, treating of the liability of sureties on successive bonds.

TWIST v. WINONA AND ST. PETER R. R. Co.

[39 MINNESOTA, 164.]

NEGLIGENCE — CONTRIBUTORY ON PART OF CHILD. — A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.

NEGLIGENCE — CONTRIBUTORY CONDUCT ON PART OF CHILD AMOUNTING TO. — A boy nearly ten and one half years old, of average intelligence, had frequently been in the vicinity of a railroad turn-table, and was familiar, in a general way, with its structure and operation. His father had frequently warned him against going on the turn-table, and told him of the danger, and the boy himself knew that it was dangerous, and that playing on it was forbidden by the railroad company; nevertheless, he engaged with other boys in swinging upon it while it was in motion, and was injured by his foot being caught between the arms of the table and the stationary abutments. In such case, the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to fully understand or appreciate the extent of the danger to which he subjected himself.

Wilson and Bowers, for the appellant.

Lusk and Bunn, for the respondent.

MITCHELL, J. This action was brought to recover damages for personal injuries sustained by plaintiff's son while playing on one of defendant's turn-tables. The table was situated upon defendant's own premises, in the suburbs of St. Peter, some five or six hundred feet from the depot. The premises were uninclosed, but the table was not so near any highway or street as to interfere with the safety or convenience of public travel. It was what is called a "skeleton" turn-table, of the kind in general use by railways, except in round-houses. In accordance with the general usage, it was not locked, but was supplied with latches of the usual kind to keep it in place when in use. These latches weighed four or five pounds each, but could be lifted out of their sockets, and the table set in motion, by comparatively small children. Boys had been frequently in the habit of setting the table in motion, and playing on it, and during the fifteen or twenty years it had been there, three boys had been injured by it, all of which facts were known to the defendant. The agents of the railway company had frequently forbidden children from playing on the table, and were in the habit of driving them away when they saw them doing so. It does not appear but that some way might be devised of keeping such turn-tables locked when

not in use, but the evidence does show that no such contrivance has yet been devised, and that the general custom is to leave them unlocked, and merely held in place by latches, as this one was. Plaintiff's son, a boy of the age of ten years and four months, went, in company with several other boys, into the vicinity of the table, and, after the others had set the table in motion, he also joined in swinging on it, and sustained the injuries complained of, in the usual way, by his foot being caught between the arms of the table and the stationary abutments. The negligence charged against the defendant is in not locking the table, so that it could not be set in motion by children.

The rule invoked by plaintiff is that laid down by this court in *Keffe v. Milwaukee etc. R'y Co.*, 21 Minn. 207, 18 Am. Rep. 393, and by the supreme court of the United States in what may be termed the pioneer "turn-table case," *Railroad Co. v. Stout*, 17 Wall. 657, in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. The line of argument adopted in the Keffe case in support of this rule is, that such machinery, being attractive to young children, presents to them a strong temptation to play with it, and thus allures them into a danger whose nature and extent they, being without judgment and discretion, can neither apprehend nor appreciate, and against which they cannot protect themselves; that such children may be said to be induced, by the owner's own conduct, to come upon the premises; that what an express invitation is to an adult, an attractive plaything is to a child of tender years; that as to them, such machinery is a hidden danger,—a trap. Much of the briefs of counsel, especially of that of defendant, is devoted to the consideration of the doctrine of these so-called "turn-table" cases, and of the question of the duty, if any, which the owner of dangerous machinery or other articles situate on his own premises owes to intermeddling or trespassing children.

The doctrine of these cases has been questioned by some courts, and repudiated by others, who hold that a land-owner is not bound to take active measures to insure the safety of intruders,—even children,—nor is he liable for any injury resulting from the lawful use of his premises to one entering

without right; that to intruders or trespassers the land-owner owes no duty; and where there is no duty to perform, there can be no negligence: *Frost v. Eastern R. R. Co.*, 64 N. H. 220; 10 Am. St. Rep. 396. Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule; but if applied to children of tender years strictly *non sui juris*, it would seem harsh and inhuman. Properly qualified and limited in its application, the doctrine of the Keffe case is, in our judgment, in accordance with both reason and the dictates of humanity. But some of the cases have undoubtedly gone too far. By adopting an extreme or extraordinary standard of duty on the part of the land-owner on the one side, and on the other side by attributing the conduct of all children to their childish instincts so as to exempt them from the charge of contributory negligence, regardless of age or mental capacity, it is obvious that the rule of the Keffe and similar cases is capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. This court itself, if it has not modified the Keffe case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application: *Kolsti v. Minnesota etc. R'y Co.*, 32 Minn. 133; *Emerson v. Peteler*, 35 Id. 481; 59 Am. Rep. 337.

It is unnecessary, however, to determine whether, upon the facts in the present case, the finding of negligence on part of the defendant can be sustained, inasmuch as it is clearly established by both the evidence and the special findings of fact that the boy himself was guilty of contributory negligence. The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied, as a rule of law, to all children without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes; and they may

be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years; but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger. In the Stout case, the defendant made an express disclaimer of any contributory negligence on part of the plaintiff. In the Keffe case, which was disposed of on the pleadings, this court said: "It was not urged upon the argument that plaintiff was guilty of contributory negligence; and we have assumed that he exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using." And, as was remarked in the Keffe case, in the cases cited in support of these "turn-table" cases, "the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of plaintiff's trespass as a bar to his right to require care, and the plaintiff's contributory negligence as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use." But the authorities are all one way, and to the effect that even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence: *Wendell v. York Central etc. R. R. Co.*, 91 N. Y. 420; *Messenger v. Dennis*, 141 Mass. 335; *Chicago etc. R'y Co. v. Eining*, 114 Ill. 79; *Brown v. European and North American R'y Co.*, 58 Me. 384; *Achtenhagen v. City of Watertown*, 18 Wis. 331; 86 Am. Dec. 769; *Masser v. Chicago etc. R'y Co.*, 68 Iowa, 602; *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92; *Ludwig v. Pillsbury*, 35 Minn. 256; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365.

The evidence in the present case shows without conflict substantially the following facts: The boy was nearly ten and a half years old, and of at least average intelligence. He had been at school since he was six or seven years old. His father

was a railroad man, in the employment of the defendant around the yard and depot, and the boy had been frequently around the railroad grounds and the turn-table with his father. He was evidently familiar, at least in a general way, with the working of the turn-table and the use of the latches. His father had repeatedly warned him against going on the turn-table, and told him of the danger, and that he must not go on it. He evidently had quite a lively sense of the danger of playing on the table, and of the manner in which accidents were liable to occur to those swinging on it. The boy himself admits that he knew there was great danger of getting hurt on it. He knew that playing on it was forbidden by the railroad company, and that if its agents saw children doing so, they would drive them off. It is suggested that his motive in going to the table was to try to induce the other boys to get off lest they might get hurt. But if he had such a realizing sense of their danger, so much the more inexcusable was it for him to go and do precisely what he knew was exposing them to danger.

Upon this state of the evidence, the jury, in addition to their general verdict, found the following facts in answer to the following questions submitted to them: "1. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that it was dangerous? Answer: Yes. 2. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that he had no right to go there, and that it was dangerous to play on the turn-table? Answer: Yes. 3. Was Verne Twist, when he went to play on this turn-table, on the day when he was hurt, of sufficient age and discretion to understand and comprehend the danger he subjected himself to. Answer: No." These special findings must, if possible, be so construed as to be consistent with each other, and also supportable by the evidence. If the third finding means that the boy was of such tender years as to be incapable of exercising any judgment and discretion, or of understanding that his acts exposed him to danger, it would be inconsistent with the other findings, and wholly unsupported by the evidence. In the light of the testimony, and taken in connection with the previous findings, all that it can mean is, that while the boy knew that he had no right to play on the turn-table, and that it was dangerous to do so, yet he did not fully understand or appreciate the extent of the danger in all its possibilities. But this may be said of almost every case

of contributory negligence, even on part of adults. No one voluntarily and unnecessarily enters a danger which he knows to exist without expecting to escape it. In all cases of conscious self-exposure, there is a failure to realize the extent or degree of the risk. But the act is none the less contributory negligence, if the party fails to exercise ordinary care. In the present case, while the boy did not realize the extent of the danger as fully as would an adult, yet he knew that he had no right to go upon the turn-table; that his father had warned him that it was dangerous, and he himself knew that it was dangerous. Yet he goes, a conscious trespasser, and does the forbidden and dangerous act. While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on part of an intelligent boy of nearly ten and a half years amounts to contributory negligence, and cannot be excused on the plea of childish instincts. We are of opinion that upon the special findings, the defendant was entitled to judgment. The cause is remanded, with directions to the district court to enter judgment for defendant.

NEGLIGENCE. — CHILD OF IMMATURE YEARS IS NOT HELD to any greater degree of care than might reasonably be expected of one of his age: *Moebus v. Herrman*, 106 N. Y. 349; 2 Am. St. Rep. 440. When a child is in the streets, without negligence either on the part of himself or parents, he is bound to use only such reasonable care as he is capable of, though of less degree than adults would be bound to use under the circumstances: *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188. And it cannot be held that the same degree of care should be exacted of a child in crossing a railroad track as must be of an adult, in order to avoid the imputation of contributory negligence; and whether the child used such care in attempting to cross the track, and in ascertaining the danger that attended his act, as would be incumbent on one of his age, is a question for the jury: *Houston etc. R. R. Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615; see *Keffe v. Railroad Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Gray v. Scott*, 66 Pa. St. 345; 5 Am. Rep. 371.

KERR v. MINNESOTA MUTUAL BENEFIT ASS'N.

[80 MINNESOTA, 174.]

INSURANCE — SUICIDE BY ASSURED TO AVOID ARREST AND TRIAL FOR CRIME. — A policy of life insurance provided that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void." The assured, in order to escape arrest for the crime of forgery in Minnesota, fled to Canada, where he was discovered and apprehended, and thereupon, to avoid being taken back to Minnesota for trial, shot and killed himself. In such case his death cannot be

treated as the proximate result of his alleged crime, and the fact of his suicide is not in itself to be construed as occurring in or growing out of a violation of law, within the meaning of the policy.

INSURANCE—SUICIDE AS DEFENSE TO ACTION ON POLICY.—In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for the forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy.

INSURANCE—MUTUAL BENEFIT ASSOCIATION—NON-PAYMENT OF ASSESSMENT.—Where the assured in a mutual benefit association died on the twenty-seventh day of July, and he had until the tenth day of the following August in which to pay the last assessment made by the association, he was not in default, and the policy was still in force at the time of his death, and the liability of the association was accordingly fixed, and was unaffected by the fact that no part of such assessment was paid on the date last mentioned.

INSURANCE—CONSTRUCTION OF CONTRACT OF INSURANCE MADE BY MUTUAL BENEFIT ASSOCIATION, and the amount of recovery to which the beneficiary was entitled under the terms of the contract, determined.

George F. Getty, for the appellant.

Fayette Marsh, for the respondent.

VANDEBURG, J. The plaintiff is the widow of Robert W. Kerr, who, on the twentieth day of April, 1884, became a member of the defendant association, and held a certificate or policy of insurance issued by it at the time of his death, which, defendant claims, was by suicide, July 27, 1885, in the dominion of Canada. The plaintiff is named as the beneficiary in this policy.

1. The policy provides that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void." The defendant offered to prove on the trial that Kerr, in order to escape arrest for the crime of forgery in this state, fled to Canada, where he was discovered and apprehended by detectives, and thereupon, to avoid being brought back to Minnesota for trial, shot and killed himself; that the criminal code of Canada forbade self-murder; and that his suicide was a violation thereof. We think this evidence was properly rejected. His death in Canada cannot be treated as the proximate result of his crime in Minnesota: *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen, 308, 319. And the fact of his suicide is not, in itself, to be construed as occurring in or growing out of a violation of law, within the meaning of the policy. In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for forfeiture of a policy issued for the benefit

of a third person, unless it is expressly so provided in the policy: *Mills v. Rebstock*, 29 Minn. 380. And under the general language here used, which must be construed favorably to the assured and strictly as against the company, the violation of law referred to in the policy ought not, we think, to be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to. Otherwise construed, the policy would be misleading in its practical operation: *Patrick v. Excelsior Life Ins. Co.*, 67 Barb. 202.

2. The court also rejected an offer by defendant to prove that the last assessment made by the company before the death of the assured was made on the first day of July, 1885, and that notice was duly given to him not later than the tenth day of July, calling for the payment thereof (the amount being ten dollars) not later than the tenth day of August, 1885, at the office of the company in Minneapolis, and that unless the same was paid by said Robert W. Kerr, the beneficiary, or some one for them, on or before the tenth day of August, said policy would be lapsed and void; that on the tenth day of August no part of the same was paid, and the policy was accordingly declared void by the company, before they had any knowledge or notice of his death. The terms of the policy, upon this subject, are: "The holder of this certificate further agrees that if he shall fail to pay to this association any quarterly assessment within forty, and any special assessment within thirty, days from the date of the notice thereof, then, and in every such case, this certificate shall be null and void." But since Kerr died on the twenty-seventh day of July, and he had until the tenth day of August in which to pay the assessment, he was not in default, and the policy was still in force at the time of his death, and the liability of the company was accordingly fixed. The exception to the ruling of the court in this matter cannot, therefore, be sustained. Whether the assessment ought not to be deducted from the amount due plaintiff, the defendant does not ask us to decide.

3. It is alleged and found that the plaintiff gave notice and made and filed due proof with the defendant of the death of the assured more than ninety days before the commencement of this action, and we do not see that the answer puts this allegation in issue. We must assume that the condition of the policy in this respect was complied with.

4. The principal question in the case is as to the amount which plaintiff is entitled to recover. By their contract, the association undertake to pay "an amount equal to one dollar and fifty cents for each certificate in force at the time such amount shall become due, but not to exceed four thousand dollars, to himself, if living, at the expiration of twenty-two years from the date hereof, and if not, to his wife, within ninety days after the receipt by the association of due notice and proof of the death of the said Robert W. Kerr; and this association promises to pay the full amount of this certificate at its maturity; provided, there shall be sufficient moneys in the fund from which this certificate shall become payable; and provided further, that said moneys shall be distributed proportionately in payment of this and any other certificate becoming due and payable the same quarter; such payment, in no case, to exceed the amount named in this certificate." The charter of the association provides the method of raising money by assessments, and it also provides that the period of twenty-two years named in the certificate shall be known as the "endowment period," and the sum designated as payable to a member at the end of this period (four thousand dollars) is styled an "endowment." Regular quarterly assessments of five dollars each are to be levied upon the members, and special assessments may be made by order of a majority of the directors. The association is also required to accumulate and maintain two funds, to be known, respectively, as the "assessment fund" and "endowment fund." All endowments are to be paid out of the latter fund, which is made up of fifteen per cent of all assessments actually paid in, except all first assessments. The balance of the assessments, less expenses, constitutes the "assessment fund," out of which beneficiaries are paid in cases where members die within the endowment period. It is clear, therefore, from the terms of the policy, that the plaintiff's claim is not to be paid from the endowment fund, but from the assessment fund.

There is some dispute over the terms of the policy in relation to the extent of the defendant's liability to beneficiaries; but it is obvious, we think, that the obligation is to pay not less than one dollar and fifty cents for each certificate in force, nor more than four thousand dollars, to be paid from the assessment fund. In respect to the amount to be raised for the beneficiary, the parties therefore have stipulated that it shall be at least one dollar and fifty cents for each certificate. An

action for the full amount of four thousand dollars, which would in any case be the limit of liability, could only be maintained upon its being shown that there was that amount in the assessment fund subject to be applied to the claim ratably with others in the same quarter; which fact is not alleged or found. But in respect to the first-named sum, that is clearly obligatory upon the association, and they are, by their charter, authorized to make assessments, regular and special, upon the members, payable within forty and thirty days respectively. The defendant has refused to pay or recognize or make any provision for the claim of the plaintiff as such beneficiary. The measure of plaintiff's damages is therefore the sum of one dollar and fifty cents for each certificate in force. It is found that there were 570 certificates in force when Kerr died, and it is not disputed by the defendant that this number was subject to assessment. The defendants are in default in not making provision for and paying this sum at least, and plaintiff is therefore shown to be entitled to recover the same in this action. But there being no moneys in the assessment fund subject to be applied upon this claim, that amount is the limit of plaintiff's recovery.

5. It is contended by the plaintiff that in conformity with the construction which defendant had previously placed on the terms of the policy in respect to payments made from the assessment fund, its uniform usage had been to pay the maximum amount in each case, and that such was the established rule of the company. It is found that prior to the death of Kerr, this defendant had paid its certificates in full from the assessment fund. It does not appear, however, that such payments were not made strictly in accordance with the terms of the charter, out of funds properly appropriated to such certificates ratably with others. We see nothing in the case to warrant us in assuming that the company has bound itself by any particular rule or usage so as to modify or control the construction of the contract as respects the nature and extent of its obligations to its members.

The difficulties which beset beneficiaries in attempting to collect the maximum sums named in the policy, or, in some cases, any specific sum, in actions for damages upon such contracts, arise intrinsically from the nature of the contract which the parties have made, and which therefore the courts are unable to remedy: *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261. The plaintiff in this case is entitled to recover the sum

of \$855, with interest from the commencement of this action. The order denying a new trial will be affirmed, but the case will be remanded, and the order of the district court for judgment will be modified as above.

INSURANCE — LIFE — DEATH OF INSURED IN CONSEQUENCE OF VIOLATION OF LAW as a defense to an action on the policy: *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115; *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550; 21 Am. Rep. 541, and note 542; *Murray v. N. Y. Life Ins. Co.*, 96 N. Y. 614; 48 Am. Rep. 658; *Overton v. St. Louis etc. Ins. Co.*, 39 Mo. 122; 90 Am. Dec. 455; death by suicide as defense to action on policy: *Eastabrook v. Union M. L. Ins. Co.*, 54 Me. 224; 89 Am. Dec. 743; *Equitable Life Ins. Co. v. Paterson*, 41 Ga. 338; 5 Am. Rep. 535; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; 19 Am. Rep. 623, and note 628; *Bigelow v. Berkshire Life Ins. Co.*, 7 Heisk. 623; 19 Am. Rep. 628, note. A life policy, conditioned to be void if the insured shall die by suicide, is not avoided by the self-destruction of the insured when insane, although he meant to kill himself, and knew that death would result from his acts: *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; 27 Am. Rep. 689; *Schultze v. Insurance Co.*, 40 Ohio St. 217; 48 Am. Rep. 676; compare *Utter v. Travelers' Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913, and note.

IN MAKING ASSESSMENTS UPON ITS MEMBERS, MUTUAL BENEFIT SOCIETY DOES NOT ACT in a judicial but in a ministerial capacity, and no presumption can arise in favor of the regularity or legality of its assessments. And when the society relies upon the failure of any member to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the mode pointed out in the charter; otherwise, the member cannot be said to be in default: *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571, and see note 576.

McCord v. Western Union Telegraph Company.

[89 MINNESOTA, 181.]

TELEGRAPH COMPANY IS LIABLE FOR FRAUD AND MISFEASANCE OF ITS AGENT, whom it has intrusted with the duty of transmitting messages over its line, in transmitting a false message, prepared by himself, to a party who receives the message in the usual course of business, and in good faith acts thereon, to his damage.

TELEGRAPH COMPANIES — TRANSMISSION OF FORGED DISPATCH BY AGENT PROXIMATE CAUSE OF LOSS. — The local agent of a telegraph company was also the agent of an express company at the same place. He sent a forged dispatch over the line of the telegraph company to a merchant in a neighboring city, requesting the latter to forward money to his correspondent at the former place, to be used in buying grain. The message was received by the merchant, who in good faith forwarded the money by express in the usual course of business, and it was intercepted and abstracted by the agent, and by him converted to his own use. In such case, the proximate cause of the merchant's loss was the sending of the forged dispatch, and the telegraph company was liable, although an action might also have been maintained against the express company.

ACTION against the Western Union Telegraph Company to recover for loss sustained by reason of a forged dispatch sent over the defendant's line by one of its agents. The facts appear in the opinion.

I. V. D. Heard, and Wager Swayne, George H. Fearons, and C. Walter Artz, for the appellant.

Flandrau, Squires, and Cutcheon, for the respondent.

VANDEBURGH, J. Dudley & Co., who resided at Grove City, Minnesota, were the agents of plaintiff for the purchase of wheat for him. He resided at Minneapolis, and was in the habit of forwarding money to them, to be used in making such purchases, in response to telegrams sent over the defendant's line, and delivered to him by it. On the first day of February, 1887, the defendant transmitted and delivered to plaintiff the following message, viz.:—

“GROVE CITY, MINN., February 1, 1887.

“To T. M. McCORD & Co.: Send one thousand or fifteen hundred to-morrow. DUDLEY & Co.”

The plaintiff in good faith acted upon this request, believing it to be genuine, and in accordance with his custom, forwarded through the American Express Company the sum of fifteen hundred dollars in currency, properly addressed to Dudley & Co., at Grove City. It turned out, however, that this dispatch was not sent by Dudley & Co., or with their knowledge or authority; but it was in fact false and fraudulent, and was written and sent by the agent of the defendant at Grove City, whose business it was to receive and transmit messages at that place. He was also at the same time the agent of the American Express Company for the transaction of its business, and for a long time previous to the date mentioned had so acted as agent for both companies at Grove City, and was well informed of plaintiff's method of doing business with Dudley & Co. On the arrival of the package by express at Grove City, containing the sum named, it was intercepted and abstracted by the agent, who converted the same to his own use. The dispatch was delivered to the plaintiff, and the money forwarded in the usual course of business. These facts, as disclosed by the record, are sufficient, we think, to establish the defendant's liability in this action.

1. Considering the business relations existing between plaintiff and Dudley & Co., the dispatch was reasonably interpreted

to mean a requisition for one thousand or fifteen hundred dollars.

2. As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; Gray on Telegraph, sec. 75.

3. The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *respondeat superior* does not apply in such a case, because the agent in sending the dispatch was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of and not in the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule: *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Fishkill Savings Inst. v. National Bank*, 80 Id. 162, 168; 36 Am. Rep. 595; *Potulni v. Saunders*, 37 Minn. 517. Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties: 1 Shearman and Redfield on Negligence, 4th ed., secs. 149, 150, 154; Taylor on Corporations, 2d ed., sec. 145. And it is immaterial in such case that the wrongful act of the servant is in itself willful, malicious, or fraudulent. Thus a carrier of passengers is bound to exercise due regard for their safety and welfare, and to protect them from insult. If the servants employed by

such carrier in the course of such employment disregard these obligations, and maliciously and willfully, and even in disregard of the express instructions of their employers, insult and maltreat passengers under their care, the master is liable: *Stewart v. Brooklyn etc. R'y Co.*, 90 N. Y. 588, 593; 43 Am. Rep. 185. In *Booth v. Farmers' etc. Bank*, 50 N. Y. 396, an officer of a bank wrongfully discharged a judgment which had been recovered by the bank, after it had been assigned to the plaintiff. It was there claimed that the authority of the officer and the bank itself to satisfy the judgment had ceased, and that hence the bank was not bound by what its president did after such assignment. But the court held otherwise, evidently upon the same general principle, as respects the duty of the bank to the assignee, and laid down the general proposition, equally applicable to the agent of the defendant in the case at bar, that the particular act of the agent or officer was wrongful and in violation of his duty, yet it was within the general scope of his powers, and as to innocent third parties dealing with the bank, who had sustained damages occasioned by such act, the corporation was responsible.

And the liability of the corporation in such cases is not affected by the fact that the particular act which the agent has assumed to do is one which the corporation itself could not rightfully or lawfully do. In *Farmers' etc. Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125, 133, 69 Am. Dec. 678, a case frequently cited with approval, the teller of a bank was, with its consent, in the habit of certifying checks for customers, but he had no authority to certify in the absence of funds, which would be a false representation; yet it was held, where he had duly certified a check, though the drawer had no funds, that the bank was liable, on the ground that, as between the bank which had employed the teller, and held him out as authorized to certify checks (which involved a representation by one whose duty it was to ascertain and know the facts), and an innocent purchaser of the check so certified, the bank ought to be the loser: *Gould v. Town of Sterling*, 23 N. Y. 439, 463; *Bank of New York v. Bank of Ohio*, 29 Id. 619, 632. See also *Titus v. President etc. Turnpike Road*, 61 Id. 237; *New York etc. R'y Co. v. Schuyler*, 34 Id. 30, 64; *Lane v. Cotton*, 12 Mod. 472, 490.

The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving dispatches in

the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendant's agents acting in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates his duty to or disobeys the instructions of the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation: *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280; *Booth v. Farmers' etc. Bank*, *supra*.

4. The defendant also insists that it is not liable for the money forwarded in response to the dispatch, because it was embezzled by Swanson as agent of the express company. It is unnecessary to consider whether an action for the amount might not have been maintained against that company as well as against the defendant or the agent himself. The position of trust in which the defendant had placed him enabled him through the use of the company's wires in the ordinary course of his agency to induce the plaintiff to place the money within his reach. It is immaterial what avenue was chosen. Had it been forwarded and intercepted by a confederate, the result would have been the same. The proximate cause of plaintiff's loss was the sending of the forged dispatch. The actual conversion of the money was only the culmination of a successful fraud. The acts of Swanson as agent of the defendant and of the express company were the execution of the different parts of one entire plan or scheme. That his subsequent acts aided and concurred in producing the result aimed at did not make the forged dispatch any the less operative as the procuring or proximate cause of plaintiff's loss: *Milwaukee*

etc. R'y Co. v. Kellogg, 94 U. S. 469, 475; *Martin v. North Star Iron Works*, 31 Minn. 407, 410.

Order affirmed, and case remanded for further proceedings.

TELEGRAPH COMPANY IS LIABLE FOR MISFEASANCE and fraudulent acts of its servants and agents: *New York etc. Printing Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Birney v. Printing Tel. Co.*, 81 Id. 616, note.

EXEMPLARY DAMAGES MAY BE RECOVERED AGAINST TELEGRAPH COMPANY FOR FAILURE TO TRANSMIT AND DELIVER MESSAGE, where there is such gross negligence on the part of the agents of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; and see *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140.

TELEGRAPH COMPANY IS NOT LIABLE FOR MISTAKE OF ITS CLERK in endeavoring, at the request of the sender, to correct a mistake in the written message: *Western Union Tel. Co. v. Foster*, 64 Tex. 220; 53 Am. Rep. 754.

EILERS v. CONRADT.

[30 MINNESOTA, 242.]

DEBTOR AND CREDITOR. — CREDITOR HAS NO CLAIM UPON HIS DEBTOR'S SERVICES, and has no right to compel the debtor to work and earn money for his benefit, nor is he defrauded if the debtor chooses to work for another person gratuitously.

HUSBAND AND WIFE — WORK PERFORMED BY HUSBAND ON WIFE'S LANDS — RIGHTS OF CREDITORS. — The defendant's insolvent husband joined with her in the execution of notes given for the purchase price of two lots, and in the mortgage executed to secure the same. He also paid one year's taxes on the lots, and one year's interest upon the joint notes, and had worked as a carpenter upon a house built by the defendant on one of the lots, paying for part of the materials. He further personally performed all of the carpenter-work upon a dwelling-house erected upon the other lot, the statutory homestead of the defendant. Out of the proceeds of the sale of the first-mentioned house and lot, the defendant paid for both lots, and thereby secured the discharge of the notes and mortgage. In such case, in the absence of a finding of any fraudulent intent by the husband and wife to cheat and defraud the husband's creditors, a judgment declaring that the defendant held the legal title to the remaining house and lot in trust for the plaintiff, and directing its sale to satisfy a judgment against the husband, could not be sustained.

APPEAL by the defendant from a judgment of the district court for Ramsey County.

McMillan and Beals, for the appellant.

S. E. Hall, for the respondent.

COLLINS, J. The defendant's husband (who is plaintiff's judgment debtor) personally performed all of the carpenter-

work upon a dwelling-house built by her upon her own lot. She has, with her husband and children, resided therein since March 25, 1885. We are not advised whether said carpenter work was performed as a gratuity or otherwise, but its value is found at six hundred dollars, no part of which has been paid. The husband had no other claim upon, interest in, or connection with said house and lot, except as follows: In the year 1882, defendant purchased, wholly upon time, lots 7 and 8 in block 19 in one of the additions to St. Paul. Her husband joined with her in the notes given for the purchase price, and mortgage executed to secure the same, in which mortgage was an agreement that a house should forthwith be built on the lots. The house was erected upon lot 8, and in it resided defendant with her family until March 25, 1885, when the house and lot were sold, the occupants moving at once into a new house, which had in the mean time been built upon lot 7, in which they have ever since resided, and which is a homestead under the laws of this state. Said husband used sixty dollars of his own money in paying for materials for the first dwelling built. He also paid one year's taxes, \$19, on the lots, and the first year's interest, \$150, upon the joint notes. And he also worked as a carpenter on the house, but the value of such labor was not ascertained. Out of the proceeds of the sale of lot 8, defendant paid for both lots, and thereby secured the discharge of both notes and mortgage.

The complaint charged a fraudulent intent, by both husband and wife, to cheat and defraud his creditors; but this was found untrue. It was further found as a fact that the design and purpose of these parties throughout the transaction was to secure for themselves a house and lot as a homestead. These findings do not warrant the conclusion of law which directed that judgment be entered declaring that the house and lot is held in trust for plaintiff to an extent necessary to satisfy his (plaintiff's) judgment against Herman Conradt, and directing a sale in the usual manner; and consequently do not support the judgment entered upon the findings. The pertinent inquiry is, Was this an honest transaction? or a mere device to cheat creditors? If it was sincere and *bona fide*, not colorable and fraudulent, not an arrangement adopted as a cover to disguise the substantial ownership of the husband and thus defraud his creditors, the latter can have no recourse upon the wife's property. The defendant, a married woman, is qualified by statute to hold and own real as well as personal

property, to make contracts, and to carry on any lawful business, independently of her spouse. She was fully competent to purchase lots, build houses, and sell the same when a good opportunity presented itself. Her husband could work for her, with or without an agreement as to his compensation, if he chose, and even go further in the management of her property, providing there be good faith in the transaction: *Hossfeldt v. Dill*, 28 Minn. 469. The questions of good faith and of honest motive have been passed upon by the proper tribunal, which has found an entire absence of fraudulent intent in all these dealings. It has gone further, and declared the purpose a very honorable one, that of securing to these people a statutory homestead.

It is true that the insolvent husband worked upon the house now involved, but this he had a right to do. If the labor was gratuitously rendered, the plaintiff cannot complain, because he has no claim upon his debtor's services. As he has no right to compel the insolvent to work and earn money for his benefit, he is not defrauded if the debtor chooses to donate his services to another: *Abbey v. Deyo*, 44 N. Y. 343.

The judgment appealed from is reversed, and the case remanded, with directions that judgment be entered in favor of defendant.

HUSBAND AND WIFE. — VALUE OF SKILL AND LABOR EXPENDED BY HUSBAND ON WIFE'S ESTATE cannot be subjected to satisfying claims against the husband: *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173, and note 177; *Nance v. Nance*, 84 Ala. 375; 5 Am. St. Rep. 378. But materials furnished by the husband with his own money, and used in improving his wife's property, if he is embarrassed, will be regarded as a gift in fraud of his creditors, who may make the wife's estate liable therefor: *Id.*

DEBTOR CANNOT BE COMPELLED TO LABOR FOR HIS CREDITORS, nor have they a remedy against his personal efforts: *Rueh v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769.

ADAMS v. CHICAGO, BURLINGTON, AND NORTHERN RAILROAD COMPANY.

[30 MINNESOTA, 286.]

EASEMENTS — HIGHWAYS. — Owner of lot abutting on public street in city has, as appurtenant to his lot, and independent of the ownership of the fee in the street, an easement in the street to the full width thereof, in front of the lot, for the admission of light and air thereto, which easement is subordinate only to the public right in the street. And depriving him of, or materially interfering with, his enjoyment of the easement for any public use not a proper street use is a taking of his property for public use within the meaning of the constitution.

HIGHWAYS — USE OF STREET BY RAILROAD. — The appropriation of a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use.

RAILROAD COMPANIES — RIGHT OF ABUTTING LAND-OWNER TO DAMAGES. — Whenever, without the consent of the owner of property abutting on a public street, and without compensation to him, an ordinary commercial railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street.

RAILROAD COMPANIES — DAMAGES TO PROPERTY FROM OPERATION OF RAILROAD ON STREET — EVIDENCE. — In an action by the owner of a lot abutting on a public street to recover damages for injuries to his property by the construction and operation of a railroad on the street, evidence which takes into account not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road on the whole or any part of the street, however remote from the lot, is inadmissible, as this would allow the plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself.

DAMAGES — MEASURE OF. — **NEW TRIAL OF ISSUE AS TO AMOUNT OF DAMAGES ORDERED** in the particular case, unless the plaintiff should consent to take judgment for nominal damages merely.

APPEAL by the defendant from an order of the district court for Winona County refusing a new trial. The facts appear in the opinion.

William Gale, J. W. Losey, and Young and Lightner, for the appellant.

Tawney and Randall, for the respondent.

GILFILLAN, C. J. Second Street, in the city of Winona, is, and for thirty years has been, a public street, seventy feet wide, running nearly east and west through the city. Plaintiff is the owner of and occupies as his residence a lot abutting

on the south side of said street. The defendant, under authority of the common council, which authority the city charter empowered the council to give, has constructed and is operating the main line of its railroad,—an ordinary commercial railroad, running to and through Winona, upon and along the north half of Second Street, passing in front of plaintiff's lot, no part of the track being laid south of the center line of the street. Safe and convenient ingress and egress to and from plaintiff's lot are not materially impaired. The injurious consequences to the lot are not due to any improper construction or operation of the road, but are such as result from constructing and operating a railroad along a street in an ordinary and prudent manner. These injurious consequences arise from the engines and trains passing day and night, and throwing steam, smoke, dust, and cinders upon the plaintiff's premises, and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate; causing physical discomforts and annoyances to plaintiff and his family, and whereby the rental value of his premises is diminished. The court below ordered judgment for the plaintiff for the damage to the rental value up to the commencement of the action, and the defendant appeals.

The principal question involved has never been directly before this court. There have been, however, cases in which the decisions bore incidentally upon it. It is well settled that where there is no taking of or encroachment on one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction or negligence in operating it, furnish no ground of action; as when the railroad is laid wholly on land which the company has acquired by purchase or condemnation, or in which the party has no interest, so that it does no wrong to him in constructing and operating the road, though there may be some inconvenience or damage to him arising from it, if it be such as the general public suffer, he has no legal cause to complain. Railroads are a necessity. And the public, which enjoys the general incidental benefits from them, must endure any general inconveniences necessarily incident to their construction and operation. And if a railroad company even wrongfully obstructs a street abutting on one's premises not at the part of

the street where it so abuts, unless access to his premises is thereby cut off or materially interfered with, any inconvenience that he may suffer therefrom furnishes no ground for a private action, because the wrong done is a public wrong, for which the public authorities are the proper parties to seek redress: See *Shaubut v. St. Paul etc. R. R. Co.*, 21 Minn. 502; *Rochette v. Chicago etc. R'y Co.*, 32 Id. 201; *Barnum v. Minnesota Transfer R'y Co.*, 33 Id. 365. But if a railroad, not touching one's premises, obstructs a street abutting on or leading to them so as to cut off or materially interfere with his only access to them, the inconvenience is deemed to be special, and not one common to the public, and an action lies: *Brakken v. Minnesota etc. R'y Co.*, 29 Id. 41. It is the same where one owns land abutting on a navigable river or lake, and a railroad is laid along between the land and the navigable water: *Brisbine v. St. Paul etc. R. R. Co.*, 23 Id. 114; *Union Depot etc. Co. v. Brunswick*, 31 Id. 297; 47 Am. Rep. 789. And also where a strip between the lots and the river has been dedicated to public use as a levee or landing, and a railroad is laid upon it: *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 59 (82); 88 Am. Dec. 59. Where, however, there is a taking of a part of a tract or lot of land, the diminution in value of the part not taken, caused by the noise of passing trains, and inconvenience and interruption to the use of the part not taken, resulting from the ordinary operation of the road: *County of Blue Earth v. St. Paul etc. R. R. Co.*, 28 Minn. 503; and from increased exposure of buildings already erected to danger of fire from passing trains: *Colvill v. St. Paul etc. R'y Co.*, 19 Id. 240 (283); *Johnson v. Chicago etc. R. R. Co.*, 37 Id. 519; and from increased danger of injury to or destruction of the household of the owner, unless the property not taken is equally valuable for some other purpose: *Curtis v. St. Paul etc. R. R. Co.*, 20 Id. 19 (28),—are proper elements of the damages to be allowed for the taking.

From these decisions the propositions may be stated: That the right of recovery against a railroad company, when there is no improper construction of or negligence in operating the railroad, for inconveniences caused by noises, smoke, dust, and cinders, does not depend on the fact that such inconveniences exist, if they be such as are common to the public at large, but on the fact that there has been a taking of the parties' property for the purpose of the railroad, accompanied with such inconveniences, or to which they are incident; and if neces-

sarily caused by the company's proper use of its own property, there can be no recovery because of them. And that, where there is a taking, such inconveniences as are necessarily incident to it, and to the use for which the property is taken, are proper elements of the damages to the party. And this further proposition (fully established and more clearly set forth in many other decisions of this court), that the rule of damage is applied only to a case where part of a distinct tract or lot is taken, in which case the damages only to the part not taken are to be estimated. As to that only are the damages deemed special. As to other distinct tracts or lots of the same owner, the inconveniences are generally such as the public suffer.

As the plaintiff does not claim to own the land in the street which the company has taken for its road, but claims only a right or interest in the nature of an easement in it appurtenant to his lot, the question has been raised and discussed at considerable length, whether, conceding the right or interest he claims, the acts of the defendant constitute a taking, within the constitutional provision prohibiting the taking of private property for public use without just compensation. As that provision is inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose. All property, whatever its character, comes within its protection. It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use. In the case of a lien on land taken for railroad purposes, the company cannot make any use of the lien. It does not succeed to the ownership of it. It merely displaces it, — destroys it. So, in case of an easement. If A has, as appurtenant to his lot, an easement for right of way over the adjoining land, and such adjoining land is taken for railroad purposes, the company does not and cannot succeed to the easement. But it may destroy or materially impair it by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to. Such destruction or impairment is within the meaning of the word "taken," as used in the constitution, as fully as is the

depriving the owner of the possession and use of his corporeal property.

The main question in the case is, Has the owner of a lot abutting on a public street a right or interest in the street opposite his lot, as appurtenant to his lot, and independent of his ownership of the soil of the street? and if so, what is that right or interest? If he has, and the acts of the defendant in constructing and operating its railroad along that part of the street opposite plaintiff's lot prevent or impair his enjoyment of such right or interest, then he has a right to recover.

We find a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the state or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public: *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289; 33 Am. Dec. 497; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis etc. R. R. Co.*, 9 Id. 467; 68 Am. Dec. 650; *Stone v. Fairbury etc. R. R. Co.*, 68 Ill. 394; 18 Am. Rep. 556; *Tate v. Ohio etc. R. R. Co.*, 7 Ind. 479; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; *Street Railway v. Cummins-ville*, 14 Ohio St. 523; *Railway Co. v. Lawrence*, 38 Id. 41; 43 Am. Rep. 419; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *City of Denver v. Bayer*, 7 Col. 113; *Town of Rensselaer v. Leopold*, 106 Ind. 29. In 38 Mich. 62, 71, the supreme court states it thus: "Every lot-owner has a peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim,—a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises, which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." Although the proposition was apparently stated with care and upon deliberation, it seems to us (and we say it with diffidence, because of the eminent character of that court) that the decision of the case was a departure from the doctrine thus laid down (and the same may be said of several of the cases referred to). For where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a

proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance. As the lot-owner can recover for a private nuisance committed by the improper operation of a railroad, even on the company's own land, in which he has no interest (*Baltimore etc. R. R. Co. v. First Baptist Church*, 108 U. S. 317), it would seem as though if he is in no better plight in respect to the company's acts in the street, his "peculiar interest," distinct from that of the public, in the street, is of very little value. His title to his interest in the street is precarious, if authority from the state or municipality may justify what would without such authority be a private wrong as to him.

None of the cases we have referred to, nor any till we come to what are known as the Elevated Railway cases, attempt to define the limits and extent of the right of an abutting lot-owner in the street opposite his lot where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, as we have seen, an action by him will lie for obstructing the street away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are asked, How does the lot-owner get an easement in the street? What are the source and evidence of his title to his peculiar interest? The same questions may be asked with respect to the right or interest of the public. When a street is established by statutory dedication, or proceedings of condemnation, the public derives its right through the dedication or proceedings, and the record of them is the evidence of its right. When the dedication is at common law, the evidence of the public right rests in parol. When the offer of dedication is made, and is accepted and acted upon by the public to such extent that to permit the offer to be withdrawn would operate as a fraud, the title of the public to its right is completely vested. And such title is none the less perfect, because there may be no express grant of the right, and no written evidence of it. The private right is vested by the same proceedings or acts that vest the public right. There is no need of express grant in one case more than in the other. In the case of dedication, after it has become perfect, the abutting lot-owners are presumed to act with respect to their lots on the faith of it as they are also in case of condemnation. Suppose one buys a piece of land fronting on a public street, or

suppose he improves it, say by erecting buildings with reference to use in connection with the street, would it not be a fraud on him to afterwards close the street? Not only do the abutting lot-owners pay for all the advantages which the street may furnish to their lots in the enhanced price of the lots, but in cases of condemnation, their lots are liable to be, and are usually, specially taxed to pay the whole cost of the land taken; and whether the street be established by dedication or condemnation, the abutting lots are liable to be and are usually specially taxed for the whole cost of putting and keeping it in proper condition for public use. It would be hard to justify the imposition of these taxes on them instead of on the public at large, if their owners have no other interest in or advantage from the street beyond the public at large, or if such interest or advantage is of so precarious a tenure that they may at any time be deprived of it.

It is, however, hardly necessary to inquire how the lot-owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extends to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford. What reason can be given for excluding a right to the street for admitting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip ten or fifteen feet wide might be sufficient. Yet everybody knows that a lot fronting on a street sixty or seventy feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the states where the fee of the streets is in the state or municipality, and of a street sixty feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to a width of ten or fifteen feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer.

The cases known as the Elevated Railway cases (*Story v. New York Elevated R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268) are notable in several respects: first, because they were the first cases (and it seems strange that they should have been) in which was squarely presented, so as to demand a direct decision, the claim of abutting lots to an easement in the street in their front for purposes of light and air; second, for the number and ability of the counsel on each side, and the thoroughness with which they discussed every point involved, and presented every argument *pro* and *con* that could be suggested; and lastly, and especially, for the exhaustive character of both the prevailing and dissenting opinions by the members of the court. The latter case was really a reargument of the questions decided in the earlier, and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. We think that in those cases the doctrine is unqualifiedly established that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever (and the public gets no greater right under a dedication), and no matter who may own the fee, "an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." The doctrine was followed and applied by the circuit court of the United States for the southern district of New York, in *Fifth Nat. Bank v. New York Elevated R. R. Co.*, 24 Fed. Rep. 114. The general doctrine, we think, stands on sound reason and considerations of practical justice.

The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front

of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended,—by employing it for uses which the public right does not justify. That constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended,—one not justified by the public right, and which the state or municipality, as representing such right, cannot, as against private rights, authorize,—the decisions of this court are full and explicit. It has always been held here, contrary to the decisions in many of the states, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it,—an appropriation of it to a use for which it was not intended: *Carli v. Stillwater Street R'y etc. Co.*, 28 Minn. 373, 41 Am. Rep. 290, and cases cited. Many of the decisions cited to show that upon a state of facts such as exists in this case the lot-owner can have no right of action, were by courts which hold that the use of a street for an ordinary railroad is a legitimate street use,—one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot-owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot-owner, whether he owns the fee of the street or not, could grow out of the proper construction and operating of a railroad in the street. For that reason, the decisions of such courts can be of no authority here, where a different rule upon the rightfulness of using the street for such a purpose prevails.

The conclusions arrived at are, that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right; that depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the constitution; that appropriating a public street to the construction and operation of an ordinary commercial rail-

road upon it is not a proper street use; that where, without his consent, and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as, upon that part of the street, to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street.

That the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street, was undoubtedly the opinion of the court below when it came to make its findings of fact; for it finds as a fact no other damage than the depreciation in the rental value of the lot caused by operating the railroad on the street in front of it. The proof of depreciation in rental value, however, was made in part by admitting proof (against defendant's objection) of the rental value "with the road constructed on that street, and operated there as roads usually are." There was no other evidence of depreciation. The evidence takes into account, not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road on the whole or any part of it, however remote from the lot. This would allow plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself. The evidence was erroneously admitted, and as there was no competent evidence to sustain the finding of the amount of damage, the finding must be set aside.

A new trial is therefore ordered of the issue as to the amount of damage (but of no other issue), unless the plaintiff will consent in the court below to take judgment for nominal damages merely.

RAILROAD COMPANIES—HIGHWAYS. — CITY CANNOT AUTHORIZE LAYING RAILROAD IN STREET, to be operated for private gain, without express statutory power: *Davis v. Mayor etc. of New York*, 14 N. Y. 506; 67 Am. Dec. 186.

EASEMENTS. — OWNER OF LOT ABUTTING ON PUBLIC STREET IN CITY HAS A PECULIAR USE in the street, as appurtenant to his tenement, in order that he may enjoy it. This right to the use of the street is an easement attaching to his adjoining lot, — an incident of his title to it, — and he cannot be deprived of it without compensation: *Fulton v. Railway Transfer Co.*, 85 Ky. 640; 7 Am. St. Rep. 619. If a railroad be so constructed and operated over

the streets of a city as unreasonably to obstruct the abutting lot-owner's means of egress and ingress from and to his lot, or if he suffers special and substantial injury by having smoke, sparks, or cinders thrown into his house, or its walls be cracked by the movement of trains, etc., he may recover for the damages directly resulting from such causes. But if he is merely inconvenienced from the construction and operation of the road, or suffers some remote consequential injury, it is *damnum absque injuria*: Id., and see cases collected in note 627, 628. Where a street railway company unreasonably use a street in a city for storing and switching cars, to the special injury of an abutting lot-owner, the latter may maintain an action therefor against the company, although the fee of the street is in the city: *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148; 43 Am. Rep. 661.

OBSTRUCTION OF STREET OR HIGHWAY IS ORDINARILY NUISANCE, and can only be justified by necessity: *Oallanan v. Gibman*, 107 N. Y. 360; 1 Am. St. Rep. 831, and note 840.

FLAHERTY v. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY.

[30 MINNESOTA, 323.]

COMMON CARRIERS — NEGLIGENCE. — Action may be maintained jointly against two railroad companies for the killing of a passenger in a train of one of the defendants, in a collision with a train of the other, where the collision and injury were caused directly by the concurrent negligence of both defendants, and a complaint in such action alleging negligence in the operation of both trains is sufficient. The negligence of the carrier upon whose train the deceased was a passenger is not imputable to him.

PLEADING. — IN ALLOWING PARTY TO WITHDRAW DEMURRER AND TO PLEAD TO FACTS ALLEGED AGAINST HIM, a court may, in the exercise of its discretion, properly impose such reasonable conditions as may prevent unnecessary delay in the trial and determination of the cause; and it must be made to appear that a party has been prejudiced, before the action of the court in such matters, not appearing to be unreasonable or prejudicial upon its face, will be held to have been an abuse of discretion.

PLEADING — ORDER OVERRULING DEMURRER — DISCRETION OF COURT. —

Where, in overruling a demurrer to a complaint, the court allowed the defendant to answer within ten days, upon the condition that the cause should proceed to trial at a term of court then being held, the imposition of this condition was not an abuse of discretion.

APPEAL by the Minneapolis and St. Louis Railway Company, impleaded with the Northern Pacific Railway Company, from an order of the district court for Ramsey County, overruling its separate demurrer to the complaint.

J. D. Springer and F. D. Larrabee, for the appellant.

I. V. D. Heard and J. D. O'Brien, for the respondent.

DICKINSON, J. Appeal by the Minneapolis and St. Louis Railway Company from an order overruling its demurrer to the complaint. The complaint is sufficient to charge the appellant company with negligence, and to show a right of recovery against it. It is alleged that, while the plaintiff's intestate was a passenger upon a train of the Northern Pacific company, he was killed in a collision of that train with a train of the Minneapolis and St. Louis company, running in the opposite direction, and that the collision was caused by the negligent manner of the operation of both trains. It is particularly alleged that both trains were running at a dangerous and unlawful rate of speed, and that the switches were not properly arranged for the running of these trains. The position of the appellant is untenable, that, in order to show its responsibility, it must appear that the train of the other defendant was rightfully upon this track. If the collision was caused directly by the concurrent negligence of both companies, both are responsible. The negligence of the common carrier upon whose train the deceased was a passenger was not imputable to him: *Follman v. City of Mankato*, 35 Minn. 522; 59 Am. Rep. 340.

It may be here stated that *Thorogood v. Bryan*, 8 Com. B. 115, and *Armstrong v. Lancashire etc. R'y Co.*, L. R. 10 Ex. 47, referred to in *Follman v. City of Mankato*, *supra*, as opposed to our decision in that case, have been recently expressly overruled in the English court of appeal: *The Bernina*, 12 Prob. Div. 58. The collision and injury having been caused directly by the concurrent wrongful acts or omissions of both defendants, all tending to produce the one resulting event complained of, the action against them jointly is maintainable, although there was no concert of action or common purpose between them: *Colegrove v. New York etc. R. R. Co.*, 20 N. Y. 492; 75 Am. Dec. 418; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163; see language of Lopes, J., in *The Bernina*, 12 Prob. Div. 58, 99; see also *Stone v. Dickinson*, 5 Allen, 29, 31; 81 Am. Dec. 727; *Chipman v. Palmer*, 77 N. Y. 51, 57; 33 Am. Rep. 566; *Slater v. Mersereau*, 64 N. Y. 138; *Cooper v. Eastern Transp. Co.*, 75 Id. 116.

In the order overruling the demurrer, the court allowed this appellant to answer within ten days, upon the condition that the cause should proceed to trial at a term of court then being held. The imposing of this condition is now assigned as an

abuse of discretion. The appellant does not appear to have reason to complain. Having admitted the allegations of the complaint by the demurrer, it had no right, as a matter of course, to withdraw that admission, and join issue upon those allegations; nor does it appear that the defendant ever sought to be allowed to do so, or claimed before the court that it had any defense to the facts alleged. The appellant cannot complain of the condition attending the granting of leave to answer, when it does not appear that it was entitled, as a matter of right, to leave to answer at all. But apart from this consideration, in allowing a party to withdraw a demurrer, and to plead to the facts alleged against him, a court may properly, in the exercise of its discretion, impose such reasonable conditions as may prevent unnecessary delay in the trial and determination of the cause; and it must be made to appear that a party has been prejudiced, before the action of the court in such matters, not appearing to be unreasonable or prejudicial upon its face, will be held to have been an abuse of discretion. The order in question seems to us to have been reasonable, at least in the absence of any showing of circumstances preventing the defendant from complying with the condition.

Order affirmed.

NEGLIGENCE. — PARTIES WHO CO-OPERATE IN DOING NEGLIGENT ACT CAUSING INJURY ARE LIABLE, either jointly or severally, for the damage thereby occasioned: *Andrews v. Boedecker*, 126 Ill. 605; 9 Am. St. Rep. 649, and cases collected in note 651.

WHEN NEGLIGENCE OF THIRD PARTY WILL NOT BE IMPUTED TO PLAINTIFF seeking damages for injury occasioned by defendant's negligence: *Brannen v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and note 417.

PLEADING. — RIGHT TO OBJECT TO RULING OF COURT ON DEMURRER IS WAIVED by amending the declaration, and going to trial on the merits: *Derracott v. Railroad Co.*, 83 Va. 288; 5 Am. St. Rep. 266, and note 271.

GODFREY v. VALENTINE.

[39 MINNESOTA, 326.]

PROCESS — PROOF OF SERVICE OF SUMMONS IN RECORD, EFFECT OF. — Where, in an action against a non-resident defendant, who was shown to have been personally beyond the jurisdiction of the court, the record states the manner in which the summons against him was served (by publication), it will not be presumed that other proof of service was made to the court than that thus shown in the record and recited in the judgment, nor that the court acquired jurisdiction, unless that is affirmatively shown.

PROCESS — SERVICE BY PUBLICATION — INSUFFICIENT PROOF OF. — Proof of the publication of the summons for "six successive weeks" is insufficient to show a publication "once in each week" for the period named.

JUDGMENTS — VOID JUDGMENT NOT RENDERED VALID BY APPEARANCE OF PARTY. — An appearance by a party in court, after the rendition of a judgment which is absolutely void for want of jurisdiction in the cause, is ineffectual to render that judgment valid.

Berryhill and Davison, for the appellant.

E. R. Holcombe and H. L. Williams, for the respondent.

DICKINSON, J. This is an appeal by the defendant from an order denying a motion to set aside a judgment entered against him in the district court, in August, 1883, the defendant never having appeared in the action. The motion raised the question of the jurisdiction of the court. After proper proof of the non-residence of the defendant, and of want of knowledge as to his place of residence, the summons was published in the *St. Paul Daily Globe*, and, upon proof by affidavit of such publication, and of the defendant's default, the cause was brought to hearing and judgment. The asserted jurisdictional defect is that the summons was not published "once in each week" for six consecutive weeks, as prescribed by the statute. The affidavit of publication, embraced in the judgment roll, states that the summons was published in the *St. Paul Daily Globe* "for the period of six successive weeks, commencing on the twenty-third day of June, 1883, on which day last mentioned it was first published, and ending on the fourth day of August, 1883, on which day last mentioned it was last published." This affidavit is referred to in the judgment itself as the proof of service upon which the court entertained jurisdiction. The statute provides that proof of service by publication shall be made by affidavit: Gen. Stats. 1878, c. 66, sec. 68; and, in case the judgment is upon default to answer, that proof of the service of the summons be incorporated in the judgment roll: *Id.*, sec. 275. It will not be presumed that

there was other proof of service than that thus shown in the record, nor, in an action against a non-resident who is shown to have been personally beyond the jurisdiction of the court, will it be presumed, the question being directly presented, that the court acquired jurisdiction by substituted service, unless that is affirmatively shown: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836; *Brown v. St. Paul etc. R'y Co.*, 38 Id. 506; *Morey v. Morey*, 27 Id. 265; *Galpin v. Page*, 18 Wall. 350.

Following the decisions in *Ullman v. Lion*, 8 Minn. 338 (381), 83 Am. Dec. 783, and *Golcher v. Brisbin*, 20 Minn. 407 (453), we must hold this affidavit of publication insufficient to show a publication "once in each week" for the prescribed period. This conclusion is also sustained by *Hernandez v. Creditors*, 57 Cal. 333.

The respondent relies in support of the judgment upon the rule declared in *Curtis v. Jackson*, 23 Minn. 268, to the effect that the appearance by a party, unless limited to mere jurisdictional questions, cures a want of jurisdiction as to a judgment previously rendered. The propriety of that rule with respect to an appearance after judgment, and for the purpose of securing relief from the judgment, was doubted in *Kanne v. Minn. etc. R'y Co.*, 33 Id. 419, 421. The doctrine of *Curtis v. Jackson*, *supra*, to the full extent expressed in that decision, cannot, we are satisfied, be sustained upon principle. Upon an application to set aside a judgment shown to have been absolutely void because the court had acquired no jurisdiction in the cause, an objection distinctly made upon that ground should not be deemed to have been at the same time waived from the fact that the moving party also urges in support of his application additional reasons not inconsistent with the alleged want of jurisdiction, nor because, by asking to be allowed to file an answer as in a pending cause, he indicates his present willingness to submit himself to the jurisdiction of the court, in order that, after a hearing upon the issues thus presented, the court may proceed to judgment. The course of the moving party in thus seeking to have a void judgment set aside, — to which relief he is entitled as a matter of right, — but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting

to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity: *Gray v. Hawes*, 8 Cal. 562; *Shaw v. Rowland*, 32 Kan. 154; *Boals v. Shules*, 29 Iowa, 507; *Briggs v. Sneghan*, 45 Ind. 14; *State v. Cohen*, 13 S. C. 198; *Moore v. Watkins*, 1 Ark. 268.

Order reversed.

PROCESS. — AFFIDAVITS OF SERVICE OF SUMMONS BY PUBLICATION AGAINST NON-RESIDENT DEFENDANT in action for divorce, and recitals thereof in the judgment, are conclusive upon a collateral attack: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146.

PROOF OF SERVICE OF SUMMONS BY PUBLICATION, what constitutes: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742.

JUDGMENT WITHOUT PARTIES, however perfect in form, is not attended with any of the consequences of a judgment, and is void: *Wilcoxon v. Burton*, 27 Cal. 228; 87 Am. Dec. 66; *Schultz v. McLean*, 76 Cal. 608.

DEAN v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

[39 MINNESOTA, 413.]

RAILROAD COMPANIES — FIRE CAUSED BY SPARKS FROM ENGINE — EVIDENCE.

— Evidence showing that a fire started in an open field near a railroad track, immediately after the passing of a locomotive and train, and that a strong wind was blowing from the south, and the fire started north of the track, that no persons were in the vicinity, and that there was no apparent cause of the fire except the passing train, justifies the conclusion that the fire was caused by the engine.

RAILROAD COMPANIES — FIRE CAUSED BY ENGINE — PRESUMPTION OF NEGLIGENCE.

— In an action against a railroad company to recover for injury from fire caused by the defendant's engine, testimony from a qualified expert witness, presented as such on the part of the defendant, that, with the appliances in use to prevent the escape of fire, the fire could not have been so caused, unless the engine had been out of repair, should be considered in connection with the statutory presumption of negligence, sufficient to justify a verdict against the defendant, although other evidence tended to exculpate the defendant.

ACTION against a railroad company to recover damages for the destruction of hay and grain on the plaintiff's land by fire alleged to have been caused by the defendant's engine.

Kingsley and Shepherd, for the appellant.

French and Wright, for the respondent.

DICKINSON, J. The evidence justified the conclusion that the fire complained of was set by the defendant's locomotive No. 146. This is a fair, if not the only reasonable, inference from the facts disclosed, showing that the fire started in the plaintiff's open field, about sixty feet from the railroad track, and far from any building or highway, immediately after the passing of the locomotive and train westward; that a strong wind was blowing from the south, and the fire started north of the track; that no persons were in the vicinity; and that there was no apparent cause of the fire except the passing train. There is more reason for contention upon the point as to whether the evidence fully rebutted the statutory presumption of negligence on the part of the defendant, so that the verdict must be regarded as unjustified. Without commenting upon the evidence of several witnesses for the defendant,—other than Anderson, to whose testimony we will hereafter refer,—we will only say, generally, that it tended to show that the engine was provided with the best means for preventing the escape of fire; that it was in good order, and that the engineer and firemen were competent to perform their respective duties. In brief, it may be conceded that such testimony tended to show that there was no negligence on the part of the defendant. But the defendant presented as a witness one Anderson, who was shown to be an expert concerning the matters in question. He was the general foreman of the mechanical department of this division of the railroad, and had been a practical locomotive-engineer. He testified particularly as to the improved spark-arrester with which this engine was provided, and the manner of its operation. Referring to this apparatus, he said: "The front end is supposed to be cleaned out at intervals of about thirty or forty miles." After speaking of the qualities of this apparatus, he expressed it as his opinion that, in the ordinary running of the engine, it is not possible for sparks to escape through this spark-arrester, "if the extension-front is properly cleaned out." He further testified that fire cannot get out of the ash-pan when the engine is in motion. The following question and answer conclude his testimony: "Question: If a fire is set by an engine, it would necessarily have to be out of repair? Answer: It would have to be considerably so. It would have to be out of repair." If this testimony was worthy of credit, it would lead to the inference that the engine was out of order in some particular,—perhaps in not having been cleaned out within the last thirty or forty miles

of its course, there being no testimony upon that subject; for there is no reason to doubt the correctness of the conclusion of the jury that this engine did cause the fire in question. In view of such testimony from a qualified expert witness, presented as such on the part of the defendant, and supporting the statutory presumption of negligence, we would not be justified in setting aside the verdict of the jury, which has been approved by the trial court, unless, at least, the other evidence in the case were most complete and convincing. The case is in some respects similar to that of *Karsen v. Milwaukee etc. R'y Co.*, 29 Minn. 12.

Order affirmed.

RAILROAD COMPANIES. — MERE FACT THAT PROPERTY IS DESTROYED OR DAMAGED BY FIRE ORIGINATING from sparks emitted from locomotive is not sufficient to fasten a liability upon the railroad company, but proof of that fact raises a presumption of negligence, consisting in a defect in the construction of the locomotive, or in the appliances used to prevent accidents from escaping sparks, or in want of care in its management, and casts on the company the burden to rebut the presumption: *Louisville etc. R. R. Co. v. Reese*, 85 Ala. 497; 7 Am. St. Rep. 66, and see cases collected in note 69. Negligence is presumed where damage occurs from fire escaping from a locomotive, and such fact need not be alleged: *Rose v. Chicago etc. R'y Co.*, 72 Iowa, 625; *Tilley v. St. Louis etc. R'y Co.*, 49 Ark. 535; *Gulf etc. R'y Co. v. White*, 68 Tex. 295; *Gulf etc. R'y Co. v. Benson*, 69 Id. 407; 5 Am. St. Rep. 74; *Galveston etc. R'y Co. v. Horne*, 69 Tex. 643; *Louisville etc. R'y Co. v. Reese*, 85 Ala. 497; 7 Am. St. Rep. 66; *Missouri P. R'y Co. v. Merrill*, 40 Kan. 404.

AHLBECK v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY COMPANY.

[29 MINNESOTA, 424.]

COMMON CARRIERS — LIABILITY FOR LOSS OF PASSENGER'S BAGGAGE. —

Where the trains of a railroad company, by arrangement with another company, enter and depart from the depot of the latter, to which the former intrusts the business of receiving, handling, and checking the baggage of its passengers, and furnishes its own checks for the purpose, such company must be considered the agent of the company first named, in respect to such business.

COMMON CARRIERS. — BAGGAGE CHECK IS IN NATURE OF RECEIPT, and is evidence of the delivery, ownership, and identity of the baggage.

COMMON CARRIERS. — POSSESSION OF BAGGAGE CHECK BY RAILWAY PASSENGER IS PRIMA FACIE EVIDENCE of the receipt and possession of his baggage by the carrier, and when he delivers such check to the agent of a connecting railroad company, and receives its check in exchange, a presumption arises, in the absence of proof to the contrary, that the baggage is received in due course by the latter company, and it is responsible therefor.

ACTION against the St. Paul, Minneapolis, and Manitoba Railway Company, to recover the value of a trunk and its contents, the baggage of the plaintiff. The facts appear in the opinion.

S. H. Hudson, for the appellant.

M. D. Grover, for the respondent.

VANDEBURGH, J. It is admitted that the plaintiff purchased of defendant a ticket entitling him to be carried as a passenger, with his personal baggage, as alleged in the complaint. The evidence on plaintiff's behalf tended to prove that he came by rail from Port Huron, where his trunk containing his baggage was checked, and where he last saw it, by way of Chicago; and at the latter place he was given another check therefor by the Chicago and Northwestern Railway Company, on whose road he came to St. Paul. At the Union depot, at the latter place, he exchanged the check of the Northwestern company for the local check of the defendant over its road to Grove City, in this state, where the defendant tendered to him a trunk not his own, to which was attached a duplicate of the check last received by him. The trains of the defendant enter and depart from the Union depot, where it has no separate place or facilities for handling baggage, but all the baggage received or delivered there by the defendant is handled by the depot company, to which the business is intrusted by the defendant; and that company checks the baggage, makes exchanges of checks thereon as may be required, using the checks of the defendant, which are furnished for such purposes. Upon this evidence a *prima facie* case was made for the plaintiff.

1. The depot company must be considered the agent of the defendant in the premises, and the latter is presumptively bound by its acts.

2. The baggage check is in the nature of a receipt, and is evidence of the delivery, ownership, and identity of the baggage: *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281; 83 Am. Dec. 143. The check received by plaintiff at Port Huron was *prima facie* evidence that the carrier received and had possession of his trunk. Upon the first exchange at Chicago, the check there received by the plaintiff was *prima facie* evidence that his trunk had passed under the control of the Northwestern Railway Company, and upon the next exchange for the check of the defendant, a like presumption arose in his favor against

the defendant. This method of doing business is adopted by public carriers for the purpose of facilitating the transfer of baggage, and for the convenience of the passenger, and devolves the care of his baggage upon the agents of the several lines of road over which he takes a continuous passage, and is intended to relieve him from such care. The burden, therefore, rested upon the defendant to show that the mistake was not its own; or, in other words, that it received from the connecting road the same trunk which it tendered to the plaintiff: *Thompson on Carriers*, 514; *Davis v. Michigan Southern etc. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151.

Judgment reversed, and case remanded for trial.

COMMON CARRIERS. — IF PASSENGERS BY RAILWAY TRAIN RETAIN THE EXCLUSIVE CUSTODY OF THEIR BAGGAGE, the carrier is not responsible for its loss unless this results from the carrier's negligence, and the failure of a passenger to use reasonable care in reference to it will defeat his right to recover: *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31, and see cases collected in note 34, 35, bearing upon the subject of the liability of common carriers for the loss of baggage of passengers.

BAGGAGE CHECK GIVEN BY RAILROAD COMPANY TO PASSENGER IS PRIMA FACIE EVIDENCE of the delivery of the baggage to the company: *Dill v. South Car. R. R. Co.*, 7 Rich. 158; 62 Am. Dec. 407; *Davis v. Michigan etc. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151; and of the owner being a passenger: *Illinois Cent. R. R. Co. v. Cepeland*, 24 Ill. 332; 76 Am. Dec. 749, and note 754.

LIABILITY FOR LOSS OF BAGGAGE while being transported over connecting lines: See *Pennsylvania R. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; 84 Am. Dec. 490; *Felder v. Columbia etc. R. R. Co.*, 21 S. C. 35; 53 Am. Rep. 656; *Atchison etc. R. R. Co. v. Roach*, 35 Kan. 740; 57 Am. Rep. 199.

MEYER v. BERLANDI. BOHN MANUFACTURING CO. v. JAMESON.

[39 MINNESOTA, 433.]

STATUTES — CONSTRUCTION. — Court is not justified in declaring act of legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect.

CONSTITUTIONAL LAW — MECHANICS' LIEN ACT. — Minnesota mechanics' lien law, chapter 170, laws of 1887, held to be unconstitutional in the following provisions: 1. That part of section 2 subjecting homesteads to liens; 2. Section 3 providing that if a contractor has received his pay from the owner of the property, and owes a debt due on contract to one of his laborers or material-men which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the penitentiary, although he may not be guilty of any fraud; 3. Section 5,

making the fact that the person who performed the labor or furnished the material was not enjoined by law by the owner from doing so, conclusive evidence that the labor was performed or material furnished with his consent; 4. That part of section 8 which provides that the deed of the sheriff on a sale under a lien shall take precedence of any other title, and that part of section 10 which provides that no prior encumbrances shall operate until the lien for labor or material is satisfied; 5. Section 11, making it the duty of the courts, when any doubt exists as to the construction of the act, to construe it so as to give the person performing any labor the full amount of his claim.

CONSTITUTIONAL LAW — DEPENDENT PROVISIONS OF STATUTE — GENERAL RULE OF CONSTRUCTION. — If the provisions of the act are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them. Within this rule, the whole of the Minnesota mechanic's lien act, chapter 170, laws of 1887, is declared to be void.

MECHANIC'S LIEN. — FILING VERIFIED STATEMENT FOR RECORD OPERATES AS CREATION OF LIEN, and until this is done an action to enforce it cannot be maintained.

PLEADING — SUPPLEMENTAL COMPLAINT. — If original complaint fails to state cause of action, it cannot be sustained by filing a supplemental one founded on matters which have subsequently occurred. A supplemental complaint can only enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing when the suit was commenced.

Two actions brought to enforce mechanics' liens. In the first case, that of Meyer against Berlandi, the action was founded upon a duly verified statement of account and claim of lien under Minnesota General Laws of 1887, chapter 170, filed by the plaintiff in the office of the register of deeds of Ramsey County, on September 21, 1887, and the action was commenced in December, 1887. On April 7, 1888, the plaintiff moved for leave to amend his complaint by inserting an allegation that on January 11, 1888, he filed an affidavit in conformity with the requirements of the Minnesota General Statutes of 1878, chapter 90. The motion was denied, and the motion of the defendants for judgment upon the pleadings was granted, and the plaintiff appealed. In the case of the Bohn Manufacturing Company against Jameson, the complaint contained a copy of the recorded lien statement and affidavit, following the requirements of the Minnesota General Statutes of 1878, chapter 90, and which was filed for record within the time therein prescribed, but not within the ninety days prescribed by the Minnesota General Laws of 1887, chap-

ter 170. The defendants demurred to the complaint, and appealed from an order overruling their demurrer.

Smith and Hawthorne, and F. C. Stevens, for the appellants.

Warner and Lawrence, and Kerr and Richardson, for the respondents.

MITCHELL, J. The question raised by these appeals is the validity of laws of 1887, c. 170, commonly known as the mechanic's lien law. While this statute has been several times before us for consideration, this question has never before been presented to the court. In *Pond Machine Tool Co. v. Robinson*, 38 Minn. 272, the only question was whether the act left the former law in force as to past claims. In *State v. Brachvogel*, 38 Id. 265, all that was decided was that the provisions of the third section were germane to the subject expressed in the title. In *Jordan v. Board of Education*, 39 Id. 298, the only question was whether the act made a public school-house subject to lien. In the present cases the validity of the entire act is assailed, mainly on the ground that it is unconstitutional, but also that it is so imperfect and incomplete as to be incapable of being carried into effect. It therefore becomes necessary to consider the whole act.

At the outset, we remark that an examination of it fully satisfies us that the act was intended to, and does, cover the whole subject covered by the former statute relating to mechanics' liens, — having the same general purpose, and touching the same ground at every point, but materially changing the legal rights of parties, and adopting a somewhat different method of enforcing them. It was therefore manifestly intended as a substitute for the former statute, and as to all future claims to be the only statute on the subject. Therefore, if valid, it works a repeal of the old law, notwithstanding the limited character of the repealing clause; and hence there is no chance to supplement it with any of the provisions of former law. In fact, the two statutes, although having the same general purpose of giving liens to laborers and material-men, work on so different lines that there is hardly a provision of the old law that will fit into the new. An examination of the act will also satisfy any lawyer that, even if all its provisions are valid, it is a very defective and incomplete skeleton, so badly lacking in working details that it would be very difficult to execute it, except by a system of construction by

the courts bordering closely upon judicial legislation. Many of its provisions, too, are so obscure that much litigation would necessarily occur before its construction would become settled. We pass these considerations by, as they would not justify a court in declaring the act invalid if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect.

But its incompleteness and obscurity are not the most serious objections to the act. Many of its provisions are flatly in violation of the constitution. The provision of the second section, giving a lien on homesteads, is clearly so. It is well settled in this state that a homestead cannot be made subject to a lien, in the absence of an agreement between the parties creating one: *Cogel v. Mickow*, 11 Minn. 354 (475); *Coleman v. Ballandi*, 22 Id. 144; *Keller v. Struck*, 31 Id. 446.

Section 3, if not unconstitutional on other grounds, is clearly repugnant to section 12, article 1, of the constitution of the state prohibiting imprisonment for debt. It is not necessary that a contractor be guilty of any fraud or other tort in order to subject him to the penalties of this section. If he has received his pay from the owner of the property, and owes a debt due on contract to one of his laborers or material-men, which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the penitentiary. No matter how honestly he may have paid over the last dollar which he has received on his contract, yet if, through honest mistake, he took the job too cheap, or if by unforeseen accident it cost more than he anticipated, and for that reason he cannot pay all that he owes for labor or material, he is a felon. This is returning with a vengeance to the old barbarous fiction upon which imprisonment for debt was originally based, viz., that a man who owed a debt, and did not pay it, was a trespasser against the peace and dignity of the crown, and for this supposititious crime was liable to arrest and imprisonment. Such a statute cannot be sustained for a moment.

Section 5 of the act is also unconstitutional. As liens are an encumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law. The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to

subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract: *O'Neil v. St. Olaf's School*, 26 Minn. 329; *Laird v. Moonan*, 32 Id. 358. The legislature, seeming to have understood that such was the law, apparently attempted to evade it by providing in section 5 that the fact that the person performing labor or furnishing material was not enjoined by law from performing labor or furnishing material, by the person in whom the title was vested at the time, shall be conclusive evidence that such labor was performed or material furnished with and by the owner's consent. In short, if a willful trespasser should go upon the land of another against his will or without his knowledge, and erect a building on it, and the owner of the land did not institute a suit, give bonds, and get out an injunction against the trespasser, he would be conclusively deemed to have consented to the erection of the building, and his land be subject to a lien in favor of the trespasser, although the owner might be entirely ignorant of the trespass until after the building was erected. The bare statement of such a proposition is sufficient. A man cannot be thus deprived of his property without his consent. The legislature may doubtless establish rules of evidence, but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law.

But perhaps the most objectionable provision of this statute, and one that goes to its very substance, is found in the tenth section, which provides that no encumbrance upon land, created before or after the making a contract or performing labor or furnishing material, shall operate upon the building erected or material furnished until the lien for labor or material is satisfied. The same thing in a still more general form is found in section 8, which provides that the deed of the sheriff on the sale on the lien judgment "shall take precedence of any other title." This is a manifest attempt to displace all prior encumbrances upon, and vested interests in, the property, or at least to postpone them to liens under the statute subsequent in time, so that, for example, a mortgagor and a material-man or laborer, as a result of some arrangement between themselves, without the knowledge or consent of the

mortgagee, might improve him out of his prior lien on the premises.

Seeing the possible objection to this, counsel for one of the defendants takes the position that the act does not give a lien on the land, but only the building, and that it is only the latter that is to be sold. But in placing such a construction upon the law, he only escapes Scylla to encounter Charybdis. To sell the building without the land would almost entirely destroy the security which the legislature designed for the protection of lien-holders. We fail to see what the purchaser could do with the building, unless it would be to tear it down and remove the rubbish. If the building alone were sold, he would have no right to a foot of the land on which it stood. The title to real estate would be infinitely perplexed if one person owned the structure and another the land. Such a construction is entirely impracticable, and if adopted, the law would be virtually incapable of execution. Hence, although the act is silent as to the land, it must be construed to include, as subject to the lien, that extent of ground, appurtenant to the building, which is reasonably necessary for its enjoyment. Such is the uniform construction of lien laws, even where there is no express statutory authority for charging the land: Phillips on Mechanics' Liens, c. 17. Nor would the constitutional objection to this section be obviated by limiting the lien to the building. We apprehend there is no doubt but that the law gives a lien for labor or material that goes into the improvement or repair of an existing building, as well as for that which goes into the construction of an entirely new one; and that in the former case, as well as the latter, the whole building is subject to the lien. So that even in that case the lien would, under this law, cut out or take precedence of prior encumbrances as to part of the security.

Another counsel, while conceding and claiming that the land as well as the building is subject to the lien, attempts to sustain section 10 by another line of reasoning. He says that while it could not affect encumbrances made prior to the passage of the act, yet all those subsequently made would be taken in contemplation of the provisions of the law, and subject to them; and in support of his contention he cites those cases, notably, *Smith v. Stevens*, 36 Minn. 303, where chattels are left in the possession and use of the mortgagor, and a lien created by him for their keep or necessary repairs has been held entitled to precedence over the mortgage, although the

latter was first in time. But we think counsel has mistaken the principle upon which all this class of cases rests. They all rest upon the doctrine of agency,—authority, implied from the circumstances, from the mortgagee to the mortgagor, to create a lien for such a purpose. This is well expressed by Erle, J., in *Williams v. Allsup*, 10 Com. B., N. S., 417, which was a case of a maritime lien on a vessel for repairs. In giving the lien precedence of the mortgage, he says (page 426): “I put my decision on the ground that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. . . . The vessel has to be kept in a state to be available as a security to the mortgagee.” The case is the same as if the mortgagee had been present when the order for repairs was given. So in *Hammond v. Danielson*, 126 Mass. 294, which was a case of a lien for repairs on a hack left in the possession of the mortgagor to be used in his business, Gray, C. J., says: “A lien on personal property cannot, indeed, be created without authority of the owner, but in the present case such an authority must be implied from the facts agreed.” So in case of a horse left in the possession and use of the mortgagor. The animal must be fed in order to preserve it. The authority of the mortgagor to create a lien for that purpose is implied from the facts. But no case ever held that a mortgagor could, without the authority of the mortgagee, expressed or implied, create a lien on the mortgaged property so as to give it precedence of the mortgage. The law, whether common or statute, giving a lien, could not give it precedence of a prior encumbrance without authority from the mortgagee back of it. But in case of a mortgage of realty, there can be no implied authority from the mortgagee that the mortgagor may go on and create liens for erecting new buildings or improving existing ones that shall take precedence of his mortgage. No facts exist in the nature of the transaction from which any such authority can be implied.

We are referred to a statute in the state of Illinois (R. S. Ill. 1881, c. 82), which it is claimed gives the lien of laborers and material-men precedence of prior mortgages, and which has been sustained by the courts of that state: *North Presbyterian Church v. Jevne*, 32 Ill. 214, 220; 83 Am. Dec. 261;

Croskey v. Northwestern Mfg. Co., 48 Ill. 481. But it will be found that it is a very different act from the one now being considered. It provides (section 17) that the previous encumbrance shall be preferred to the extent of the value of the land at the time the lien attached, and that the court shall ascertain and determine what proportion of the proceeds of the sale shall be paid to the several parties in interest. The cases cited illustrate how this works. The value of the land before the labor is performed or material furnished is first ascertained, then the amount of the additional value given to the property by the improvement, and when the property is sold the proceeds are distributed in that ratio; the anterior encumbrance being preferred to the extent of the value of the property at the time the mechanic's lien attached, and the laborer or material-man taking priority to the extent of the additional value given to the property by him. This, in theory at least, gives the prior encumbrancer the benefit of his entire security, as it was when he took his mortgage. But our act gives the laborer or material-man a lien, not merely to the extent he has enhanced the value of the property, but to the full amount due him according to his contract with the owner, and gives that lien precedence as to the whole property. To illustrate how this might work: suppose A, owning a house and lot worth five thousand dollars, mortgages it to B for its full value, and subsequently contracts with C to enlarge or remodel the house for the agreed sum of five thousand dollars, but the improvements only enhance the value of the property one thousand dollars. C, not receiving his pay, files a lien for five thousand dollars, on which the property is sold, and brings six thousand dollars. Under this law, C would get five thousand dollars and B only one thousand dollars. Or, suppose it sold for only five thousand dollars, C would get the whole and B nothing. It is not in the power of the legislature to take away a man's property in this way. Third parties having vested rights in the land, and not parties or privies to the contract, cannot be prejudiced by a subsequent mechanic's lien. The law must leave it, as it does any other encumbrance, to take effect in its order of time. The principle of constitutional law applies that no one can be deprived of his property without his consent, except for public use, nor without due compensation first being made: *Overton on Liens*, sec. 536; *Brown v. Morison*, 5 Ark. 217; *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481.

It is no answer to this objection to say that all encumbrances or other interests in property, acquired subsequent to the passage of the act, must be deemed as taken subject to the provisions of the law, which enter into and form a part of the contract. This rule, which is a familiar one, always presupposes that the law is valid. It is no more in the power of the legislature to pass a law taking from a man, without his consent and without process of law, property which he may thereafter acquire, than it is to pass a law depriving him of property which he had acquired before its passage.

Although not important by itself, it may be added that the eleventh section of the act is clearly void. It provides that, when any doubt exists as to the construction of the law, it shall be the duty of the court to construe it so as to give the person performing any labor the full amount of his claim, over and above costs and attorney's fees. This is a clear invasion of the functions of the judiciary. The legislature enacts the laws, but it belongs to the courts alone to construe them. Other provisions of the law, of at least doubtful validity, might be referred to, but we do not deem it necessary.

The important question remains whether the remainder of the statute can stand, or whether it must all fall. The rule laid down by Cooley, and adopted by this court, is, that if the provisions of the act are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them: *O'Brien v. Krenz*, 36 Minn. 136. Applying this rule to this case, we think the whole statute must fall. Some of these invalid provisions could doubtless be eliminated from the act, and the balance of it stand as the expression of the legislative will; but others are so intimately connected with the essential plan and scope of the act that there would not be enough left of it to make it capable of being carried into effect according to the legislative intent. The great object of the act manifestly was to give greater rights and fuller protection to laborers and material-men than they had under the old law, and the provisions which we hold invalid were evidently those which the legislature especially designed to effect that purpose, and which constituted the

chief inducement to pass the act. It is hardly possible to conceive that, had the legislature supposed that these provisions were invalid, they would have enacted the remainder of the act as a substitute for the old law. The whole act must therefore fall, leaving General Statutes 1878, chapter 90, still in full force.

We are aware that a court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case; but this seems to us to be such a case. Were any serious evils likely to result from holding this law invalid, we might hesitate. But there has been so much doubt, both as to the meaning and the validity of this act, that we apprehend almost every careful lawyer has taken the precaution, where the necessary facts existed, to bring all proceedings to enforce mechanics' liens within the requirements of the old law as well as the new. Again, even if the act could be sustained, it is so imperfect and obscure in many respects that much contention and litigation over its construction would inevitably follow,—a state of things which would be especially disastrous to the very class which the law was intended to benefit. Therefore, looking merely to practical results, it is better for all parties that they be left under the provisions of the old law, and if it is defective in any particular, the legislature can amend.

The result is, that in the case of *Bohn Mfg. Co. v. Jameson* the claim of lien was seasonably filed, and the demurrer to the complaint was properly overruled. In the case of *Meyer v. Berlandi* the claim for a lien first filed was insufficient; and as the right to a lien is dependent upon the filing of a proper statement, deficiencies cannot be helped out by allegations in the complaint of facts which should be contained in the statement filed. Treating the proposed amendment to the complaint as a supplemental pleading, setting up the filing of another statement for a lien subsequently to the commencement of the action, the amendment was properly disallowed: The filing of the statement operates as the creation of a lien, and until this is done, an action to enforce the lien cannot be maintained: *Rugg v. Hoover*, 28 Minn. 404. If an original complaint is wholly defective, and there are no grounds for proceeding upon it, it cannot be sustained by filing a supplemental one, founded on matters which have subsequently taken place. A supplemental complaint can only enlarge or change the kind of relief to which a party may be entitled,

where a cause of action exists at the time of the commencement of the action: *Lowry v. Harris*, 12 Minn. 166 (255). The judgment of dismissal in this case must also be affirmed.

Order and judgment affirmed.

STATUTES — CONSTRUCTION OF, IN GENERAL: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and note 53.

STATUTES ARE FATALY DEFECTIVE WHICH DO NOT FOLLOW strict constitutional provisions in their enactment: *State v. Tuffy*, 19 Nev. 391; 31 Am. St. Rep. 895; *Rison v. Farr*, 24 Ark. 161; 87 Am. Dec. 52.

UNCONSTITUTIONAL PROVISION IN STATUTE WHICH MAY BE ELIMINATED without impairing the general scheme of the act vitiates only so much of the statute as may be adjudged unconstitutional: *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; *In re Groff*, 21 Neb. 647; 59 Am. Rep. 859.

STATUTE CREATING MECHANICS' LIENS, BEING REMEDIAL, are to be liberally construed: *White Lake Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262, and see note 265.

AMENDMENT TO COMPLAINT STATING NEW CAUSE OF ACTION IS NOT ALLOWABLE, especially if the new cause is barred by the statute of limitations: *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649.

PIERRO v. ST. PAUL AND NORTHERN PACIFIC R'y Co.

[89 MINNESOTA, 451.]

JUDGMENTS — IDENTITY OF SUBJECT-MATTER OF ACTION — EVIDENCE. — The complaint in an action commenced in the district court of the state described the lands constituting the subject-matter of the action as being in "Bottineau's addition to Minneapolis." The action was removed to the circuit court of the United States, and the certified complaint in the latter court designated the lands as being in "Bottinen's addition to Minneapolis." In such case, the word "Bottinen" instead of "Bottineau," in the certified complaint in the circuit court, is to be deemed the result of clerical error, and the record in the circuit *prima facie* as applicable to the land in question in "Bottineau's addition."

JUDGMENTS — RES JUDICATA. — **FORMER RECOVERY FOR USE** and occupation, in an action to recover possession of the land, is a bar to a subsequent action for injuries to the estate during the same period of occupation.

TRESPASS. — **SEVERAL ACTIONS CANNOT BE MAINTAINED TO RECOVER DAMAGES FOR SINGLE AND COMPLETED TRESPASS** upon and injury to an entire tract of land; and a recovery of damages in respect to a portion of the land will bar a subsequent recovery in respect to another portion of the same tract, the cause of action being entire and indivisible.

ACTION to recover damages for trespass upon and injury to the plaintiff's land. The opinion states the case.

Jordan, Penney, and Hammond, for the appellant.

D. A. Secombe, for the respondent.

DICKINSON, J. The decision upon a former appeal in this action is reported in 37 Minn. 314. After a new trial and a verdict for the defendant, the plaintiff has appealed from an order refusing another new trial. The cause of action here asserted is trespass upon an injury to a strip of land sixty-two feet in width, consisting of the westerly twenty-two feet of several lots in Bottineau's second addition to Minneapolis, with the adjacent forty feet, comprising that half of Main Street upon which such lots abut. The street had not been opened to public travel, as is alleged, and the plaintiff had inclosed and was using it for private purposes. Upon the trial there was offered and received in evidence the record of a judgment of the circuit court of the United States in an action by this plaintiff against this defendant corporation, awarding to the plaintiff a recovery of twenty dollars damages, with costs. That action had been commenced in the district court of the state, but was removed to the federal court. The cause of action appearing in the copy of the complaint in the circuit court was the entry of the defendant upon, and its wrongful possession of, the westerly twenty-two feet of the plaintiff's lots, numbered and described as in the complaint in this action, except that they are there designated as being in "Bottinen's addition to Minneapolis." A recovery of possession was sought, together with the value of the use and occupation. In connection with the record from the circuit court, the defendant, in the trial of the present action, offered in evidence the complaint in that cause in the district court, in which the land was described as being in "Bottineau's addition." This evidence was properly received. The proof last referred to was sufficient to show *prima facie* the identity of the lots designated in the complaints in the two actions, and that the word "Bottinen" instead of "Bottineau," in the copy of the complaint sent to the circuit court, was the result of clerical error.

In deciding the former appeal in this action, *Pierro v. St. Paul etc. R'y Co.*, 37 Minn. 314, it was held by the majority of the court that a recovery for the use and occupation, in an action for that purpose and for the recovery of possession of the land, was a bar to a subsequent action for injury to the estate caused during the same period of occupation. Therefore there could be no recovery in this action for the alleged damage with respect to the twenty-two feet which was the subject of the former action. As to the adjacent forty feet, the result is necessarily the same. The decision above cited rests upon the

identity and entirety of the causes of action alleged, the wrongful use and occupation, and the coincident injury to the property. The recovery for the use and occupation was, so far as concerns this question of estoppel, the same as though it had included damages for the injury done by the defendant while in occupation. The former recovery of damages, it is true, was only in respect to the twenty-two feet; but that would operate as a bar to a subsequent action to recover damages for injury to or upon the adjacent forty feet, caused by the same tortious acts of the defendant. The trespass now complained of in respect to the whole sixty-two feet was identical with the entry and possession alleged in the former action as to the twenty-two feet. The defendant's trespass and injury upon the whole tract of land was a single and indivisible tort, for which the plaintiff's right to recover damages was entire and indivisible. The whole cause of action was complete, and the damages now sought to be recovered had fully accrued, and presumably were known, when the former action was brought. One may not split an entire complete cause of action, and have several recoveries of damages therefor. One recovery, although it be for a part only of the entire injury, is effectual as an estoppel: *Thompson v. Myrick*, 24 Minn. 4; *Memmer v. Carey*, 30 Id. 458; *McCaffrey v. Carter*, 125 Mass. 330; *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705; *Farrington v. Payne* 15 Johns. 432; *Herriter v. Porter*, 23 Cal. 385; *Osborne v. Atkins*, 6 Gray, 423.

Whether the plaintiff could have maintained several actions for the recovery of the possession of several parts of the entire tract of land, need not be considered. However that may be, the plaintiff was not compelled to seek to recover his damages for the wrongful acts of the defendant in any such action. He might have maintained a separate action for that purpose. But as that cause of action for damages was entire, he could not have several recoveries in respect to different portions of the tract. One recovery, in whatever form of action, would constitute a bar.

This action being barred by the former recovery, the verdict for the defendant was right, and the other assignments of error upon matters not affecting this result need not be considered.

Order affirmed.

RES ADJUDICATA. — PRIOR JUDGMENT IS BAR TO MAINTENANCE OF ANOTHER CAUSE OF ACTION which necessarily involves the questions already

litigated, or which might have been litigated in the former action. One test for determining whether the causes of action are identical is to inquire whether the same evidence will support both: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436; and see note to *Burles v. Shannon*, 96 Am. Dec. 741.

JUDGMENT IN ACTION FOR USE AND OCCUPATION FOR ONE MONTH'S RENT recovered pending a former action in another court for use and occupation, under the same lease for several previous months' rent, is a bar to that action, the rent being all due when the former action was brought: *Burritt v. Belfy*, 47 Conn. 323; 36 Am. Rep. 79.

FORMER JUDGMENT IN TRESPASS, WHEN NOT CONCLUSIVE EVIDENCE in subsequent action of: *Fahey v. Crotty*, 63 Mich. 383; 6 Am. St. Rep. 305.

RES JUDICATA. — When the subject-matter of an action has been once determined, a new action will not be entertained in regard to it: *Albertson v. Williams*, 97 N. C. 264; *Honaker v. Cecil*, 84 Ky. 202; *Jarboe v. Severin*, 112 Ind. 572; *Furneau v. Whitewater Bank*, 38 Kan. 59; 7 Am. St. Rep. 541.

INGALLS v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY COMPANY.

[39 MINNESOTA, 479.]

FIXTURES — RIGHT TO REMOVE BUILDING ERECTED UNDER LICENSE ON ANOTHER'S LAND. — One who erects a building upon the land of another by his license is regarded as continuing to be the owner of the building, and entitled to remove it, if it be practicable, and works no serious injury to the land, provided the consideration of the case be uninfluenced by the unreasonable laches of the licensee, or by other special circumstances. And in such case, the licensee is entitled to a reasonable opportunity to remove the building upon revocation of the license.

Tolman and Baldwin, for the appellant.

Reynolds and Stewart, for the respondents.

GILFILLAN, C. J. This is an action for converting a dwelling-house, claimed by plaintiff to be personal property belonging to him, and by defendant to be part of real estate belonging to it. The case, as it is presented here, must turn on the decision of the question whether it was personal property or was part of the realty; or rather, whether there was evidence from which the jury might find it personal property. On the evidence, the court below directed a verdict for the defendant, and the verdict was so rendered. The evidence tended to prove that in 1861, 1862, or 1863, one Stevens, with others, owned the land, and he had charge of it for all the owners; that about that time one Huntington, who had no interest in the land, erected the building; that about 1864 he sold it to

Whiting Brothers, and they sold it, in 1872, to plaintiff, and he was in possession from that time until April 14, 1885; that on that day a tenant of his moved out, and that on the following day the defendant took possession, claiming that it owned the house; that in 1881, Stevens and the other owners (except the owner of an undivided one eighth) conveyed the land to defendant, and that at the time of purchasing, the defendant had notice that the plaintiff claimed to own the house. As to how the house came to be built, Stevens testified that between 1861 and 1863 Huntington came to him, and wanted a place to put a little building, and Stevens told him he could put it on the land in question, but gave him no interest in the land. Under this permission the house appears to have been built, and it remained there, without objection from any one, so far as appears, till taken by defendant.

If the jury had found this testimony to be true, it would have made a case of putting the house on the land by license of the owner. There was nothing in the manner of constructing it, or in the mode of its connection with the soil, to require a finding that it was intended to be permanently annexed so as to become a part of the freehold; for it does not appear that it could not be removed without injury to the land. The jury might have found it a case of mere license, without any agreement, except such as might be implied from it and the circumstances under which it was given, as to whether the house, after its construction, should belong to the builder, or to the owner of the land. In accordance with the general current of authorities, this court, in *Little v. Willford*, 31 Minn. 173, announced and followed the rule that "where the authority for placing a building upon the land of another rests upon his license, and the consideration of the case is uninfluenced by the unreasonable laches of the licensee, or other special circumstances, he is regarded as continuing to be the owner of the building, and equitably entitled to remove the same if he elects, and if such removal be practicable, and works no serious injury to the land or premises of the licensor to which it was annexed." This rule, originating in courts of equity, has come to be recognized at law: *Id.* A mere license to enter upon real estate is revocable. But if the licensee have erected, pursuant to it, a building which continues to be his property, he is entitled, upon revocation, to a reasonable opportunity to remove it. According to the testimony, the defendant appropriated the building without giving plaintiff any such oppor-

tunity; indeed, without giving him any notice of the revocation other than by the act of appropriation. The case ought to have been submitted to the jury.

Order reversed.

FIXTURES. — STRUCTURE ERECTED ON LAND OF ANOTHER BECOMES HIS PROPERTY, although built with a view of enforcing an adverse right in the land: *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 89. And where one enters into possession of land under a contract for future purchase, paying no rent, and erects substantial buildings and machinery for the prosecution of his business, and fails to fulfill the contract and acquire title, the erections are realty: *Hinkley etc. Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346. But where a purchaser, in possession of land under an oral contract of sale, built a frame house thereon, and the vendor afterward repudiated the contract, and took possession of the house, it was held that the purchaser could maintain replevin for it: *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710. And a building does not become part of the realty, when erected upon the land of another by the latter's permission, upon an agreement that it may be removed at the pleasure of the builder: *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33; 100 Am. Dec. 336, and note 337.

WOODEN STRUCTURE OR BUILDING MERELY RESTING BY ITS OWN WEIGHT on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture: *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467; and see *State Savings Bank v. Kircheval*, 65 Mo. 682; 27 Am. Rep. 310.

FIXTURES. — By agreement, property which otherwise would become a fixture by reason of annexation may retain its character of personalty, provided no intervening rights have accrued: *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 409. Hotel building, moved upon leased realty, remains personalty, if such was the intention of the parties: *Docking v. Teaxell*, 38 Kan. 420.

BEYERSDORF v. SUMP.

[39 MINNESOTA, 495.]

MALICIOUS ATTACHMENT — REQUISITES OF COMPLAINT IN ACTION FOR. — To sustain action for damages for malicious issuance of attachment brought against the plaintiff in the attachment suit, it must be alleged and shown that the writ was issued maliciously, and without probable cause. But a complaint in such action which alleges that the affidavit for the attachment was wholly false in every particular, and that the plaintiff in the attachment suit knew it to be so when he made it, is sufficient as against a general objection at the trial to the admission of any evidence under it.

PLEADING AND PRACTICE — PLEA OF FORMER ACTION PENDING. — The pendency of a former action between the same parties for the same cause may be pleaded in abatement, if a judgment in such action would be a bar to a judgment in the second action, and it is immaterial that the form of the two actions be different, or there were additional parties defendant in the former suit, if each action is predicated upon substantially the same facts as respects the defendants named in both.

TRESPASS — FORM OF VERDICT. — In trespass *de bonis* against two defendants, if both are found jointly liable for a portion of the goods, and one severally liable for the balance, a verdict according to the facts as found is proper.

DAMAGES — WRONGFUL DETENTION OF GOODS FROM OWNER — MATTER IN MITIGATION OF DAMAGE. — If goods are wrongfully withheld from the owner, in order to subject them to levy under process to be issued, the wrong-doer is not entitled to show, in mitigation of damages, that the goods were subsequently applied in satisfaction of an execution issued upon a judgment against the owner. But if the goods, though wrongfully withheld, are subject to levy, and are in good faith and without fraud or collusion afterwards levied on and sold under process against the owner, that fact may be shown in mitigation.

ACTION brought by Charles Beyersdorf against A. L. Sump and another to recover damages for maliciously causing a writ of attachment to be issued against the plaintiff. Other facts appear in the opinion. The judgment was for the plaintiff, and the defendants appealed.

Jordan, Penney, and Hammond, for the appellants.

John H. Long, for the respondent.

VANDEBURGH, J. There is no evidence that the attachment described in the complaint was issued maliciously and without probable cause; and the court submitted the case to the jury solely upon the evidence of the conduct of the defendants in withholding the goods from the plaintiff after the dissolution of the attachment.

1. No objection having been made to the complaint for misjoinder of causes of action, the court properly overruled the objection made on behalf of both defendants jointly to the admission of any evidence in the case under the complaint. In respect to the defendant Mullen, the officer who attached the property in question, it is alleged that he refused to deliver the same to plaintiff upon demand, after the attachment was dissolved. This shows a liability against him. But there is nothing to connect him with the acts of defendant Sump in causing the writ to be issued, and the writ was a protection to the officer, in so far as he acted in obedience to it: *Gunz v. Heffner*, 33 Minn. 215. And to make a case against the defendant Sump, it should appear by proper averment, not merely that the affidavit for the attachment was false, but that he caused the writ to issue maliciously and without probable cause: 2 Greenl. Ev., sec. 454; *Given v. Webb*, 7 Rob. (N. Y.) 65; *Cochrane v. Quackenbush*, 29 Minn. 376; Bliss on Code .

Pleading, 2d ed., sec. 287. Malice, in such cases, is an issuable fact to be pleaded. In this case, however, the plaintiff alleges that the affidavit for the attachment was wholly false in every particular, and that the defendant Sump knew it to be so when he made it. It also appears that the attachment was duly dissolved five days after, and the property discharged from the levy; so that the complaint is sufficient to show want of probable cause and malice, by implication at least. It would be good after verdict, and we think, also, as against a general objection such as was made in this case; for had the attention of the court been specifically called to the form of the allegation, the defect might have been cured by amendment. The first exception is not sustained.

2. The defendants' answer sets up the pendency of a former suit between the same parties for the same cause. Upon the trial, in support of this answer, the defendants offered the complaint and record in another action in the same court, by the same plaintiff, against these defendants and the sureties in the attachment bond. But the complaint shows that the ground and subject-matter are the same, though the allegations are somewhat varied. The evidence should have been received; there is no doubt that the substantial facts relied on for a recovery in each case are the same: *Drea v. Cariveau*, 28 Minn. 280. It is not material that there were additional parties defendant in that suit, since a judgment in that action against these defendants would be predicated upon the same facts here relied on for a recovery; that is, there is the same ground of liability against them in each action: *Bigelow v. Winsor*, 1 Gray, 299. Clearly, the plaintiff would not be entitled to judgment in both actions; and if a judgment in the former suit would be a bar, the pendency of that action may be pleaded in abatement of this, though the form of the action be different: *Marsh v. Masterton*, 101 N. Y. 401, 407; *Sanderson v. Peabody*, 58 N. H. 116. The exclusion of the evidence was error.

3. The record shows that a portion of the goods levied on were subsequently released to the Standard Furniture Company, by the consent and direction of the defendant Sump. The claim and title of the Standard company thereto are put in issue by the reply. In order to escape liability for those goods, it was incumbent on the defendants to show that the Standard company owned them. Since this issue was presented by the pleadings, and submitted upon the evidence, a

several verdict thereon was proper as to Sump. If the goods were wrongfully withheld from plaintiff after the discharge of the attachment, through the collusion of the defendants, in order to subject them to garnishment by defendant Sump, and ultimately to an execution in the same case, the defendants would not be entitled to show, in mitigation of damages, that the goods were afterwards levied on and sold upon execution issued in the attachment suit, because no one is permitted to found a claim or defense upon his own wrongful acts. But if the goods were subject to levy, and were in good faith, and without fraud or collusion, levied on and sold under the execution issued in that suit, that fact may be shown in reduction of damages: *Howard v. Manderfield*, 31 Minn. 337; *Jellett v. St. Paul etc. R'y Co.*, 30 Id. 265.

Judgment reversed, and new trial ordered.

ACTION FOR WRONGFULLY SUING OUT ATTACHMENT, REQUISITES TO SUSTAIN, pleading, evidence, damages, etc.: *Burton v. Knapp*, 14 Iowa, 196; 81 Am. Dec. 465, and note 476-480. See also, as to damages in such action, *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630; *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Rep. 337.

ABATEMENT BY PLEA OF FORMER ACTION PENDING: *Smith v. Lathrop*, 44 Pa. St. 326; 84 Am. Dec. 448, and note 452-457.

TRESPASS. — IN ACTIONS AGAINST SEVERAL DEFENDANTS FOR THEIR JOINT TRESPASS, damages may be severed and apportioned according to the degree and nature of the offense committed by each: *Smith v. Singleton*, 2 McMull. 184; 39 Am. Dec. 122. In trespass for taking and selling the personal property of one person under an execution against another, the measure of damages is the value of the owner's interest in the property sold: *Ross v. Story*, 1 Pa. St. 190; 44 Am. Dec. 121.

ABATEMENT — PENDENCY OF ANOTHER ACTION. — An action for forcible entry is not so similar to an action for holding over under a lease that the pendency of one will abate the other: *Steele v. Grand Trunk etc. R. R. Co.*, 125 Ill. 385.

ALT v. BANHOLZER.

[39 MINNESOTA, 511.]

HOMESTEAD — MORTGAGE OF HOMESTEAD NOT SIGNED BY WIFE OF MORTGAGOR IS INVALID. — A mortgage (not for purchase-money) of his homestead by a married man without his wife's signature is absolutely void, and is not rendered valid by subsequent abandonment of the homestead, nor by the fact that the husband and wife are subsequently divorced. And the covenants of title in such a mortgage will not operate as an estoppel by deed against the mortgagor or his assigns.

ESTOPPEL BY DEED. — COVENANTS IN DEED CAN HAVE NO GREATER VALIDITY than the deed itself; and in order that such covenants may work an estoppel, the deed itself must be a valid instrument.

MARRIAGE AND DIVORCE. — DECREE OF DIVORCE DOES NOT RELATE BACK, but takes effect only from the date of the judgment.

ACTION brought by Anna M. Alt against Frederick Banholzer to have a mortgage adjudged void. Other facts appear in the opinion. The judgment was for the plaintiff, and the defendant appealed.

Jordan, Penney, and Hammond, for the appellant.

Thomas Canty, for the respondent.

MITCHELL, J. The only facts here material are, that a married man executed upon his homestead a mortgage (not for purchase-money), with covenants of title, but without his wife's signature. Subsequently the wife obtained a divorce, and having since become the purchaser of the premises, brings this suit against the mortgagee to have the mortgage adjudged void. Inasmuch as the court finds as facts that the mortgagee knew when he took the mortgage that the mortgagor was a married man, and that the plaintiff, when she purchased, did not agree to pay the mortgage, the questions involved on a former appeal (36 Minn. 57) do not now arise. Two or three well-settled propositions of law are decisive of the case.

1. Under our statute, a conveyance or mortgage (not for purchase-money) of his homestead by a married man, without his wife's signature, is absolutely void, and is not rendered valid by the fact that the premises subsequently lose their character as a homestead: *Barton v. Drake*, 21 Minn. 299. Decisions from other states, construing their statutes as protecting only what may be called the "homestead right," and hence holding that the husband has an estate in the premises outside of and beyond that right, which may be the subject of a sale or mortgage by his sole deed, are not in point.

2. The fact that in this case the wife has since obtained a divorce from the mortgagor is immaterial. A decree of divorce does not relate back, but takes effect only from the date of the judgment.

3. The covenants in the mortgage cannot operate as an estoppel by deed against the mortgagor or his assigns. To work an estoppel, the mortgage itself must be a valid instrument. The covenants can have no greater validity than the deed itself. It would nullify the statute to hold that a deed which the law declares void should, by reason of the covenants of

the grantor, operate effectually as a conveyance: Bigelow on Estoppel, 338-340; Thompson on Homestead and Execution, sec. 474; *Connor v. McMurray*, 2 Allen, 202; *Barton v. Drake*, 21 Minn. 299; *Conrad v. Lane*, 26 Id. 389; 37 Am. Rep. 412.

There is nothing in the assignments of error on the admission of evidence. The most that can be said of any of the evidence objected to is, that it was immaterial, but could not possibly have affected the result, and hence its admission, if error, was without prejudice.

Order and judgment affirmed.

WHETHER CONVEYANCE OR MORTGAGE OF HOMESTEAD, WITH OR WITHOUT COVENANTS FOR TITLE, EXECUTED BY ONLY ONE OF THE SPOUSES, MAY BECOME OPERATIVE ON SUBSEQUENT ABANDONMENT, OR ON THE PROPERTY BECOMING VESTED SOLELY IN THE SPOUSE WHO MADE THE CONVEYANCE. — The subject of the conveyance of homesteads is discussed at some length in a note to *Pool v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481, 482-489, where the decisions bearing upon the necessity of the joinder of husband and wife in a release of the homestead are collected: See also the more recent cases of *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Kaes v. Grass*, 92 Mo. 647; 1 Am. St. Rep. 767; *Stanton v. Hitchcock*, 64 Mich. 316; 8 Am. St. Rep. 821.

The purpose and object of the homestead provision is the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father; and the statutory enactments in aid of such provision and supplemental thereto are to be given a liberal construction, so that the purposes intended by the laws shall the better be advanced and secured. Especially have the courts been induced to adopt a strict rule respecting the alienation of homesteads, and it is well settled that the homestead right can be barred only by complying strictly with the laws prescribing the mode of alienation. To divest the homestead estate, there must be a literal compliance with the mode of alienation prescribed by the statute: *Howell v. McCrie*, 36 Kan. 636; 59 Am. Rep. 584; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66; *Dickinson v. McLane*, 57 N. H. 31; *Moore v. Titman*, 33 Ill. 360. Where, for instance, the statute deprives every head of a family of the right to alienate the homestead, unless his wife joins in the conveyance, it is not within the power of the court to hold that any mode of conveyance, different from that required by the act, is effectual, either by way of estoppel or otherwise: *Dickinson v. McLane*, 57 N. H. 31. The only way to bind the wife to an alienation, lien, encumbrance, contract of sale, lease, or any interest whatever in the homestead that will interfere with or deprive her of the free use, occupancy, and enjoyment of all and every part thereof, is her consent, freely given, jointly with that of her husband: *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770, and note 777; *Myrick v. Bill*, 5 Dak. 167. The fact of joint consent is best evidenced by a writing to that effect, but if not so required in express terms, the consent can be established by such facts and circumstances as the necessity of particular cases requires: *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770; but see *Jenkins v. Simmons*, 37 Kan. 496. Under the provisions of the Tennessee statute, a conveyance by the husband in which the wife does not join, but to which she verbally assents, will not deprive her of her homestead right: *Collins v. Baytt*, 87 Tenn. 334; see also *Donner v. Redenbaugh*, 61 Iowa, 269;

Ring v. Burt, 17 Mich. 465; 97 Am. Dec. 200. But the provision that no conveyance of the homestead shall be valid unless the husband and wife join therein, is held not to apply to a case where the husband deeds to the wife: *Harsh v. Griffin*, 72 Iowa, 608; *Burkett v. Burkett*, 78 Cal. 310.

When the wife does not join with the husband in executing the conveyance, the status of the land as a homestead remains unaltered: *Simpson v. Houston*, 97 N. C. 344. And the rule established in many of the states is, as held in the principal case, that the mortgage of a homestead given by a married man without his wife's signature is void absolutely, and not merely as to the homestead interest: *Sherrid v. Southwick*, 43 Mich. 515; *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Conway v. Elgin*, 38 Minn. 469. Thus, in Wisconsin, a mortgage or other alienation by a married man of his homestead, containing no reservation of the homestead right, is absolutely void unless signed by the wife: *Ferguson v. Mason*, 60 Wis. 377. And in a later case it is said, that "it would be a violation of all rules of construction to hold that a mortgage by the husband of the homestead, without the signature of the wife thereto, was valid, after the homestead right had expired. This would be pure legislation, importing into the statute important words which the legislature did not see fit to use": Cole, C. J., in *Herron v. Knapp*, 72 Wis. 553. Nor does the fact that the wife was living apart from her husband when the mortgage was executed dispense with the necessity of her signature to the instrument to make it valid: *Id.*; *Sherrid v. Southwick*, 43 Mich. 515; *Ott v. Sprague*, 27 Kan. 620; *Castlebury v. Maynard*, 95 N. C. 281; nor is the instrument rendered valid by the fact that the husband was old and infirm and poor, and was given by him for food and the necessities of life furnished by the mortgagee: *Herron v. Knapp*, 72 Wis. 553; nor is it validated by a subsequent abandonment of the homestead: *Bruner v. Bateman*, 66 Iowa, 488. The conditions existing at the time of the execution of the instrument determine its validity or invalidity, which cannot be affected by subsequent events, as, for instance, by the family's subsequent removal, temporary or permanent, from the homestead: *Cummings v. Busby*, 62 Minn. 195. But a conveyance of a homestead reserving to the grantor "the sole, free, and absolute use and control" thereof, "so long as he and his wife, or either of them, may live," conveys only a future estate to be enjoyed after the homestead right shall cease, and is valid without the signature of the wife: *Ferguson v. Mason*, 60 Wis. 377.

Homestead statutes have sometimes been construed as protecting only the "homestead right," the decisions holding that the husband has an estate in the premises beyond that right, which may be the subject of a sale or mortgage by his sole deed. Thus in an earlier California case it was held that a conveyance of the homestead by the husband, although containing no reservation of the homestead right, and absolute in its terms, is a good conveyance of the reversionary interest in the property after the homestead right ceases: *Gee v. Moore*, 14 Cal. 472; and to the same effect is *Stewart v. Mackey*, 16 Tex. 56; *Smith v. Provin*, 4 Allen, 516. See also note to *Pool v. Gerrard*, 65 Am. Dec. 486. So in giving construction to the earlier homestead statutes of Illinois, it was held that a deed by the husband of his homestead, without the wife's signature, operated to pass the fee, subject only to a suspension of the right to take possession until such homestead right was extinguished: *McDonald v. Crandall*, 43 Ill. 238; 92 Am. Dec. 112; and see *Brown v. Coon*, 36 Ill. 243; *Coe v. Smith*, 47 Id. 225; *Hewitt v. Templeton*, 48 Id. 367. It was held, however, that those statutes did not create a new estate, but simply an exemption: *Id.*; and it was further held that the exemption did not affect

the rights of heirs or devisees: *Turner v. Bennett*, 70 Id. 263; *Fight v. Holt*, 80 Id. 84. But by the Illinois homestead act of 1873, an "estate" of homestead is created, not to exceed in value one thousand dollars, and if the land is worth less than that, a mortgage containing no release or waiver of homestead is inoperative and void, as having nothing upon which to take effect: *Browning v. Harris*, 99 Id. 456; but if it exceeds that amount in value, the excess is liable to the same liens, and may be aliened in the same manner as the householder's other real property: Id.; *Hotchkiss v. Brooks*, 93 Id. 386, 392. Accordingly, where the owner of a homestead had executed three mortgages upon the homestead premises, the first of which contained no sufficient waiver or release of the right of homestead, and the other two did, it was held that the latter had priority over the first to the extent of one thousand dollars: *Eldridge v. Pierce*, 90 Id. 474. Under statutes which limit the homestead exemption to property of a given value, or to a particular number of acres, it has been frequently held that a mortgage of a tract of land, including the homestead, executed by a married man without the concurrence and signature of the wife, though invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances, is valid as to the portion of such tract, if any, not embraced within such exempt homestead: *Goodloe v. Dean*, 81 Ala. 479; *Swift v. Dewey*, 20 Neb. 107; *Bank of Louisiana v. Lyons*, 52 Miss. 181; *Wallace v. Harris*, 32 Mich. 398; *Smith v. Miller*, 31 Ill. 161. But a different view was entertained in a case arising under the Massachusetts statute, in which it was decided that a mortgage by the husband alone, of property designated as a homestead in the deed of purchase, was utterly void, although the property mortgaged was of far greater value than the homestead by statute exempted from levy upon execution: *Richards v. Chase*, 2 Gray, 383. But see *Smith v. Provin*, 4 Allen, 516. Under the Texas constitution of 1876, all mortgages or other liens upon the homestead, whether made by the husband or by the husband and wife, are absolutely void, and are not vitalized by the divestiture of the homestead character: *Inge v. Cain*, 65 Tex. 75; *Hays v. Hays*, 66 Id. 606. But there is no such provision in the constitution respecting conveyances or contracts to convey. And where the husband alone executes a bond to convey property owned and occupied at the time as a homestead, and afterwards removes with his family to a new home which he was providing for the family at the time, and abandons the former home, he may be compelled in a suit for specific performance to convey the title. Or if facts exist which would prevent the enforcement of a specific performance of the contract, an action for damages will lie for its breach against the husband when damage has been sustained: *Goff v. Jones*, 70 Id. 572; compare *Yost v. Devault*, 3 Iowa, 345; 66 Am. Dec. 92; 9 Iowa, 60. So it is held that the husband, without the concurrence of the wife, may divest his place of business of the homestead protection by abandonment, and then himself convey it. But he cannot make a deed of assignment to it before abandonment, without the concurrence of his wife in legal form: *Inge v. Cain*, 65 Tex. 75; *Miller v. Menke*, 56 Id. 539; and see *Hemphill v. Haas*, Ky. Ct. App., 1889. So long as the premises are the homestead, the husband cannot alone, or by acts of estoppel, pass the title: *Coker v. Roberts*, Sup. Ct. Tex., 1888. Under the Tennessee statute, a conveyance of the homestead by the husband alone is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right: *Williams v. Williams*, 7 Baxt. 118; *Rhea v. Rhea*, 15 Lea, 527; and the subsequent removal of the wife with her husband from the homestead is not an abandonment of her homestead rights.

Collins v. Baytt, 87 Tenn. 334, overruling *Levason v. Abrahams*, 14 Lea, 336. See also *Phillips v. Stanch*, 20 Mich. 369. So in Michigan, a mortgage made by a married man, and covering his homestead, is void, as it respects the homestead, if executed without his wife's signature, and it is not validated by the wife's death: *Shoemaker v. Collins*, 49 Id. 595; and see *Larson v. Reynolds*, 13 Iowa, 579.

In Massachusetts, the homestead estate is not an estate in fee-simple, but a limited estate which may or may not continue for the life of the husband and wife, and for a term of years for their children, and it is this homestead interest that cannot be conveyed by the sole deed of the husband. Beyond the limited estate thus carved out, the husband has an estate in reversion, which may be the subject of sale or mortgage by him by his sole deed: *Smith v. Proven*, 4 Allen, 516; *White v. Rice*, 5 Id. 73; *Silloway v. Brown*, 12 Id. 32. But covenants of warranty in a deed of land, executed by the husband alone, do not estop him from availing himself of an estate of homestead therein which existed at the time of the execution of the deed: *Doyle v. Curn*, 6 Allen, 71; *Connor v. McMurray*, 2 Id. 202.

In California, a decree of divorce by which the homestead of the parties is partitioned between them destroys the homestead, and thereafter either spouse may convey his or her interest in the premises without the other joining in the conveyance: *Shoemaker v. Chalfant*, 47 Cal. 432; *Gimmy v. Doane*, 22 Id. 638. And a deed executed by a husband to his wife, after their divorce, of community property, on which a homestead had been previously declared, is valid, and passes all the interest of the grantor, and a mortgage subsequently executed thereon by the wife alone creates a lien on the entire premises: *Grupe v. Byers*, 73 Cal. 271. And where a decree of divorce is granted without an adjudication of the rights of property in a homestead, which was declared originally upon the separate property of the husband, and conveyed by him to his wife before the commencement of the divorce suit, the title of the wife becomes absolute from the granting of the divorce: *Burkett v. Burkett*, 78 Cal. 310; *ante*, p. 58.

ESTOPPEL BY DEED. — A husband who executes a void mortgage of his wife's statutory estate is not estopped thereby, and may defend for his wife when he is sued by the mortgagee: *McIntosh v. Parker*, 82 Ala. 238. Compare *Cuthrell v. Hawkins*, 98 N. C. 203; *Grigsby v. Peak*, 68 Tex. 235; 2 Am. St. Rep. 482, and note; *McInnis v. Pickett*, 65 Miss. 354.

DECREE OF DIVORCE does not relate back to a period prior to the death of one of the parties, where such party dies before decree is rendered: *Wilson v. Wilson*, Mich., Feb., 1889.

CITY OF WINONA v. SCHOOL DISTRICT No. 82,
WINONA COUNTY.

[40 MINNESOTA, 12.]

PART OF TERRITORY OF SCHOOL DISTRICT, WHICH IS ANNEXED TO CITY BY STATUTE, becomes part of the city for school as well as for other municipal purposes, and ceases to be a part of the school district.

ACT DOES NOT VIOLATE CONSTITUTIONAL PROVISION REQUIRING ITS SUBJECT TO BE EXPRESSED in its title, because it does not mention in its title other acts which it repeals or alters by implication on account of repugnancy or inconsistency, if all its provisions are germane to the subject expressed in its title.

CHANGE OF BOUNDARY OF MUNICIPAL CORPORATIONS, EFFECT OF ON THEIR PROPERTY RIGHTS. — Where part of the territory of one municipal corporation is taken from it and annexed to another, the former corporation retains all its property, including that which happens to fall within the limits of such other corporation, unless some other provision is made by the act authorizing the separation.

ACTION to recover possession of a school-house and site. Judgment was rendered for the defendant. Other facts are stated in the opinion.

H. L. Buck and W. A. Finkelburg, for the appellant.

J. W. Dyckson, and Gould and Snow, for the respondent.

MITCHELL, J. The defendant, a duly organized public school district, acquired and held for school purposes a school-house and site. In February, 1887, an act was passed entitled "An act to amend the charter of the city of Winona" (Special Laws 1887, c. 5), which extended the limits of the city so as to include a part of the defendant district, embracing the school-house in question. This act contained no express provision changing the limits of the school district, and none as to the disposition of this school property. The question now is, To which, plaintiff or defendant, does the school-house belong?

The first question that arises is, whether the annexed territory remains a part of the defendant district, or has become a part of the city of Winona for school as well as for other municipal purposes. By chapter 155, Special Laws 1878, "An act for the establishment and regulation of the public schools in the city of Winona," and the acts amendatory thereof, it was provided that the territory within the corporate limits of the city of Winona shall constitute one school district for the regulation and management of the public schools in said city, to be under the direction and control of a board, whose members are to be elected at the charter election, two for each ward,

and one for the city at large, to constitute the "board of education of the city of Winona." The city council must approve and ratify every contract made by the board for the purchase of any site for a school-house. The board has to submit to the city council annually an estimate of the amount of money necessary to defray the expenses of the schools, which is subject to their approval; and, to raise the amount as thus approved, the council levies a tax on all the property in the city, which is collected in the same manner as other city taxes, and the money paid over to the city treasurer. The title to all school property is to be taken in the name of the city; and, when sold, deeds are to be made in its name as grantor, and signed by the mayor, and countersigned by the city recorder. These and other provisions of the act which might be referred to show beyond all doubt that its purpose was to adopt a policy, and not a mere arbitrary geographical line, and that this policy was to establish a uniform school system, not for the territory then happening to be within the city, but for the city, whatever its area might be, whether enlarged or diminished in the future; and that the board of education, although invested with certain limited corporate powers, should be one of the departments of the city government, much like a board of public works or park commissioners. Hence, any territory annexed to the city becomes a part of it for school as well as for other municipal purposes. To hold otherwise, in view of the provisions of the act of 1878, would lead to much confusion and many incongruities. Take, for example, this very case: if the territory annexed to the city remains a part of the defendant district, the inhabitants would be entitled to take part in the election of members of the board of education of the city, and their property be taxed for the support of city schools, in the benefits of which they would have no part. We are therefore of opinion that by its annexation to the city, this territory was detached from, and is no longer a part of, the defendant district: *Connor v. Board of Education*, 10 Minn. 439.

It is urged that the act of 1887, amending the charter of the city of Winona, if held to have the effect of thus changing the boundaries of these school districts, would be in conflict with section 27, article 4, of the state constitution, because that subject is not expressed in the title of the act. We think a moment's reflection will suggest that there is nothing in this point. Every provision in that act is germane to the subject expressed in the title. If it repeals or alters any other act, it

is by implication, because of repugnancy or inconsistency. If the title of an act embraces only one subject, we apprehend it was never claimed that every other act which it repeals or alters by implication must be mentioned in the title of the new act. Any such rule would be neither within the reason of the constitution, nor practicable. It would compel the legislature in every instance to search the entire body of our statute law to ascertain what acts might be inconsistent with or repugnant to the provisions of the proposed act,—a work, in many cases, so difficult as to amount to an impossibility: *State v. Smith*, 35 Minn. 257.

We have, then, a case where the legislature has changed the boundaries of two municipalities (but without abolishing either), so that corporate property acquired and held by one for public or governmental purposes now falls within the territorial limits of the other, but has made no provision for the division of the property, or apportionment of the debts of the two incorporations. The question is, Under such a state of facts, does the property continue to belong to the incorporation from which the territory has been detached? or has it become the property of the municipality within whose limits it now falls? The absolute right of the legislature, in all cases not within any constitutional prohibition, to create, alter, divide, or abolish all municipal corporations, or *quasi* corporations, and to make such division and apportionment of the corporate property and debts of an old corporation, in case of a division of its territory, as the legislature may deem equitable, is well settled. This doctrine has been fully recognized by this court: *State v. City of Lake City*, 25 Minn. 404. But in the present case, the legislature has made no such division or apportionment. The rule generally laid down in both the text-books and the adjudicated cases is, that if a part of the territory of a municipal corporation is separated from it by annexation to another, or by the erection of a new corporation, the old corporation still retains all its property, and is responsible for all its debts, unless some other provision is made by the act authorizing the separation. In fact, this general rule is not questioned or denied by plaintiff's counsel; but they claim that it is subject to a limitation or exception as to real property; that, as to such property, the old corporation only retains what remains within its boundaries, and that whatever is situated in the territory detached from it belongs to the corporation to which it is annexed, or the new one into which

it is erected. The paucity of decisions directly in point on this precise question is somewhat surprising. The earliest cases in this country involving the subject of the disposition of corporate property or debts, on division of municipal corporations, arose under the township system of New England, where the township was parochial as well as civil, each township originally constituting but one parish. Subsequently, as the country became more densely populated, new towns or new parishes would be erected out of part of the territory of the original one, and the question would arise as to the title of the parish meeting-house or other town property, or as to which corporation was responsible for town liabilities contracted or incurred before the division. In all these cases, beginning with that of *Windham v. Portland*, 4 Mass. 384, the rule is laid down as we have already stated it; Parsons, C. J., in the case just cited, adding: "Thus it [the old town] would continue seised of all its lands, possessed of all its personal property, entitled to all its rights of action, bound by all its contracts, and subject to all its duties": See also *Hampshire v. Franklin*, 16 Mass. 76, 86; and *First Parish in Medford v. Pratt*, 4 Pick. 222. It is true that in none of these cases did the question arise as to corporate realty situated in the detached territory; but no exception as to such property is even suggested.

In *School District v. Richardson*, 23 Pick. 62, although only *obiter*, it is said that the alteration of a school district, by increasing or diminishing its size, would not destroy its identity, or affect its rights of property; that, as the identity of the corporation would remain, it would seem that the property would not be divested, although the school-house, by the newly assigned limits, might fall without the territory of the district.

In *Union Baptist Society v. Town of Candia*, 2 N. H. 20, the proprietors gave the town of Chester a lot for the use of the ministry. A portion of the town, including this lot, was subsequently incorporated into a separate town by the name of "Candia." The town of Candia having realized a sum of money by an assumed lease of the lot, the plaintiff, a religious society, incorporated and worshiping in Candia, brought suit for a portion of the interest on the fund. It is true that it may be said that this lot was not strictly public or corporate property, but merely held in trust by the town for pious uses. But in deciding the case the court say the facts do not raise the question whether a town, as a civil corporation, has the

sole right to property given "for the use of the ministry," or whether each individual, each settled minister, or each religious society in the town, has a proportionate right to it. "Because the lot was granted to Chester, and not to Candia, and whether by the grant there vested in Chester an absolute fee, a base fee determinable on the settlement of a minister, a trust for each theological association, or any other imaginable interest, is of no consequence. . . . It is apparent that when Candia was formed from Chester, though this lot fell within its boundaries, it was not conveyed to that town, either in its charter or by any vote of Chester. The title to it, therefore, like the title to all other land within its limits, remained unchanged, and the town [of Candia] acquired over that, as over other land, only a corporate jurisdiction." This was approved in *South Hampton v. Fowler*, 52 N. H. 225, 230.

Whittier v. Sanborn, 38 Me. 32, is directly in point. It was there held that the alteration by a town of the lines of a school district, whereby its school-house is left within the limits of another district, will not defeat or affect its right of property therein: See also *North Yarmouth v. Skillings*, 45 Me. 133.

In the case of *Board of Health v. City of East Saginaw*, 45 Mich. 257, the facts were, that land had been conveyed to the board of health in trust for cemetery purposes for the township of Buena Vista. Subsequently the city of East Saginaw was incorporated out of a part of the township, including the cemetery. This case, while perhaps like *Union Baptist Society v. Town of Candia*, *supra*, distinguishable in its facts from the present one, is nevertheless in point, in view of grounds upon which its decision is made to rest, and the legal propositions laid down by the court. It was there held that corporate property is not affected at common law by changes which leave the corporate character in existence, and do not destroy the corporate identity; that there is no common-law rule by which property can be transferred from one corporation to another without a grant; and that, as there was no statute making any different provision, the property was unaffected by the change in boundaries.

In *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 102, a portion of the town was annexed to the city, including a tract of land which the town had acquired by purchase. It was held that the act extending the city limits over the land in question did not divest the town of its title. The case does not disclose for what purpose the town acquired or used the

land, but it is fair to assume that it was only for some public and municipal purpose. The weight of the decision as an authority in point, however, is weakened by the fact that the court denied the power of the legislature to divest a corporation of its property without the consent of its inhabitants.

In *Town of Depere v. Town of Bellevue*, 31 Wis. 120, the broad and unqualified proposition was laid down that, if a part of the territory of a town is separated from it by annexation to another, or by the creation of a new corporation, the remaining part of the town, as the former corporation, retains all its property, and remains subject to all its obligations, unless some express provision to the contrary is made by the act authorizing the separation. In this case, however, the only question before the court was the right of the old town to compel the new town to contribute towards the payment of corporate debts contracted before the division. We find no decision in conflict with this rule, although there are some *obiter dicta* suggesting the limitation or qualification of it contended for by plaintiff. Thus in *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, 171, after stating the rule as above, the court adds: "At least as it regards property which has no fixed location in the new town, as lands, buildings, etc." And in *School District v. Tapley*, 1 Allen, 49, the court, referring to the *dictum* in *School District v. Richardson*, *supra*, remarks: "It is at least questionable whether the better practical rule in all cases would not be to regard this species of property [school-houses] in towns as strictly local in its character and uses, and as vesting in the district in which, upon any new division, it might chance to fall." How far this remark was suggested by the peculiar relations which school districts and school property bore to the towns in that state, it is impossible to say.

In *Laramie Co. v. Albany Co.*, 92 U. S. 307, 315, the judge delivering the opinion says: "Old debts she [the original corporation] must pay without any claim for contribution, and the new subdivision has no claim to any portion of the public property, except what falls within her boundaries, and to all that the old corporation has no claim." The same limitation is repeated in *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 525, and quoted by this court in *State v. City of Lake City*, *supra*.

This is all that we have been able to find in support of plaintiff's contention. But it is a remarkable fact that these suggestions of a limitation or qualification of the rule are not only

pure *obiter*, but the question is not discussed, no reason is assigned, and no authority cited in its support, unless it be the old case of *North Hempstead v. Hempstead*, 2 Wend. 109, which, as we shall see, is not at all in point.

There is a line of cases, often confounded with, but clearly distinguishable from, that now under consideration, where the old corporation was entirely abolished, and new ones created out of its territory. In such cases it is well settled that the new corporations are to be deemed the successors of the old one, and as such liable for all its debts and entitled to all its property. And in the absence of any legislative provision on the subject, it is held in such cases that each of the new corporations will take the property which happens to fall within its limits. This result the courts have arrived at from what seem the necessities of the case, in view of the defective legislation on the subject. *School District v. Richardson, supra*, and *School District v. Tapley, supra*, fall under this head. Cases where two corporations have been united or consolidated into one may also be placed in this class. Such is *Robbins v. School District*, 10 Minn. 268 (340, 349). The case of *North Hempstead v. Hempstead, supra*, also belongs to this class; for, as we understand the statement of facts, the original town of Hempstead had been entirely abolished, and two new towns erected out of its territory, called, respectively, North Hempstead and South Hempstead,—the latter afterwards changed to Hempstead; and notwithstanding some loose remarks, apparently on both sides of the question we are now considering, the court made the decision of the case largely to turn upon the fact that the two new towns had acquiesced in a practical division of the property (common) for thirty-seven years, and therefore, whatever their rights might have been at the date of the division, they were barred by the lapse of time. In *Connor v. Board of Education, supra*, the title of the school-house was held to be in the city of St. Anthony, not by virtue of the act of 1860, extending the city limits, but under the express provisions of the act of 1861.

The authorities on the question, so far as there are any, are therefore all against the contention of plaintiff; and upon reason and principle we cannot see why any distinction should be made as to property which, on change of boundaries, falls within the limits of another municipality, or why the title should not, like that of all other property, remain unaffected by the change. A municipal corporation is an artificial per-

son, and not mere territory. The annexation of territory to it merely gives it municipal control over it, and not title to the land. In this case the plaintiff and defendant are the identical corporate entities they were before,—the one with enlarged, and the other with diminished, area. The school-house was at the time of the change of boundaries the property of defendant. It could not be transferred to the plaintiff, except by grant. There has been no express grant, and we can see no ground upon which it can be held that there was an implied one.

It being settled law that upon a change of boundaries (not abolishing the corporation) the old corporation is, upon the ground that it is the same legal entity as before, liable for all corporate debts without any claim for contribution against the corporation to which the territory is annexed, or into which it is erected, it would seem to follow, as the complement of this and upon the same ground, that the old corporation retains all the corporate property regardless of situation. No general rule will work equitably in all cases. In each case the legislature ought to inquire into the facts, and make what would be an equitable division of property and apportionment of debts, in view of the particular facts of the case. But where this has not been done, and the courts are compelled to adopt some general rule, we think the one we have suggested is most in accordance with legal principles, and will work approximate justice in more cases than any other. The only argument advanced in favor of the rule contended for by plaintiff which has any weight is, that it is to be presumed that the legislature intended public corporate property to be continued to be used for the purpose for which it was acquired; and as it cannot be used for that purpose by the old corporation, if without its territorial limits, therefore it must be presumed that the legislature intended it to pass to the corporation within whose limits it fell on the change of boundaries. We think this line of argument both presumes and assumes too much. It is rather strained to pile up one presumption on top of another, in order to make out an implied legislative grant; and the assumption that a municipal corporation can never hold and use for municipal purposes property situated outside of its territorial limits is not fully warranted by any legal doctrine. Doubtless the statutes generally contemplate that property thus acquired and held should be situated within the municipal limits, and it is equally true that for most

municipal purposes the property must be so situated, and the courts would take notice of the fact that this is true of school-houses; but it would be too much to say that this is necessarily true as to property held for any and all municipal uses. And while it may be true, as a matter of law, that a school district cannot continue to use for school purposes a school-house which, upon a change of boundaries, ceases to be within its limits, it may be equally true, as a matter of fact, that it cannot, on account of its location, be used for that purpose by the corporation to which it is annexed; and therefore all it can do with it, if it gets it, is to sell it, and use the proceeds in erecting one more suitably located. If this be done, it can be as well done by the old district, which would ordinarily have the most equitable claim to it.

Judgment affirmed.

MUNICIPAL CORPORATIONS. — Legislative annexation of other territory to a town will make it a town in the future, even if it was not a town before: *Bow v. Allenstown*, 34 N. H. 351; 69 Am. Dec. 489.

CONSTITUTIONAL LAW — STATUTES. — Where a statute by implication amends a prior statute, it is not within the provision of the Kansas constitution, which requires new acts to contain the amended sections of the prior act: *State v. Cross*, 38 Kan. 606. A statute amending a section of a prior statute having but one object is sufficient, if it purports to amend that section: *Attorney-General v. Amos*, 60 Mich. 372; *Saunders v. Provisional Municipality*, 24 Fla. 226. But in Pennsylvania the constitution expressly provides that no statute shall be amended by a mere reference to its title in the amending act: *Titusville etc. Works v. Keystone Oil Co.*, 122 Pa. St. 627; compare *State v. Phenix*, 16 Or. 107; *Burnett v. Turner*, 87 Tenn. 124; *State v. Algood*, 87 Id. 163; *People v. Gadway*, 61 Mich. 285; 1 Am. St. Rep. 576; *Denham v. Holeman*, 26 Ga. 182; 71 Am. Dec. 198; note to *Davis v. State*, 61 Id. 337-346; note to *People v. McCann*, 69 Id. 649-651.

STATUTES IMPLIEDLY REPEALED. — A later statute does not repeal by implication a prior statute, unless there is an irreconcilable repugnancy between the two statutes: *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Edgar v. Greer*, 8 Iowa, 394; 74 Am. Dec. 316; *Korah v. City of Ottawa*, 32 Ill. 121; 83 Am. Dec. 255; *Rauole v. Kennedy*, 23 Ala. 240; 58 Am. Dec. 289. And repeals by implication are not favored, unless there is a strong and clear inconsistency between enactments: *State v. Wilson*, 43 N. H. 415; 82 Am. Dec. 163; *Western S. F. Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447; *Neill v. Keese*, 5 Tex. 23; 51 Am. Dec. 746; *Rogers v. Watrous*, 8 Tex. 62; 58 Am. Dec. 100. Compare note to *Towle v. Marrett*, 14 Id. 209, 210, as to repeal of statutes by implication; and to the same effect are the recent cases: *State v. Palmes*, 23 Fla. 620; *Chamberlain v. State*, 50 Ark. 132. A statute purporting to cover an entire subject repeals all former statutes on the same subject, either with or without a repealing clause, even though it may omit many material provisions of the earlier statutes: *Terrell v. State*, 86 Tenn. 523; *Druggist Cases*, 88 Id. 450; *Pos v. State*, 85 Id. 495; *Parriot v. Ferguson*, 83 Ky. 18.

STATUTES — TITLES TO — AMENDMENTS. — An amendatory act which merely recites in its caption the title of the act sought to be amended, without enlarging its scope, is constitutional and valid, provided its purview is germane to the title of the original act: *Hyman v. State*, 87 Tenn. 109; compare *Burnett v. Turner*, 87 Id. 124. The caption of an amendatory act need not indicate the particular character of the proposed amendment, if the title of the original act is therein set out, and the purview of the amending act is germane to the title thus recited: *State v. Algood*, 87 Id. 163. An act to amend certain sections of a prior act whose title is mentioned will relate to the same general subject, and for that reason must contain no provision which is not germane to that subject: *Dalese v. Pierce*, 124 Ill. 140; compare *State v. Babcock*, 23 Neb. 128; *Morrison v. St. Louis etc. R'y Co.*, 96 Mo. 602. It is not necessary in legislation amending prior acts to set out the amended act and also the original act; it is sufficient to set out in full the act as amended: *State v. Powder Mfg. Co.*, 50 N. J. L. 75; *State v. Phenline*, 16 Or. 107. Compare *Watkins v. Eureka Springs*, 49 Ark. 131.

STEWART v. MINNESOTA TRIBUNE COMPANY.

[40 MINNESOTA, 101.]

LIBEL — PROOF OF LOSS OR DAMAGE NECESSARY TO MAINTAIN ACTION FOR.

— To sustain an action for libel, it must appear that the plaintiff has sustained some special loss or damage following as the necessary or natural and proximate consequence of the publication complained of, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication.

WORDS HELD NOT LIBELOUS. — To publish of a professional man that he has moved his office up to his house to save expense is not libelous.

LAW OF LIBEL CANNOT BE INVOKED TO REDRESS EVERY BREACH OF GOOD MORALS or of good manners in newspaper publications respecting individuals.

ACTION for libel brought by the plaintiff, an attorney at law, against the defendants, for publishing in an article in their newspaper these words: "Elder Stewart has moved his office up to his house to save expense." The court below sustained a demurrer to the complaint, and the plaintiff appealed.

F. F. Davis, for the appellant.

Miller and Young, for the respondents.

VANDEBURGH, J. We are unable to say that the trial court erred in sustaining the demurrer to the complaint. It is not every false charge against an individual, though reduced to writing, and maliciously published, that will sustain an action

for damages. It must appear that the plaintiff has sustained some special loss or damage following as the necessary or natural and proximate consequence of the publication, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his reputation or business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication: *Stone v. Cooper*, 2 Denio, 293, 299; Cooley on Torts, 2d ed., 241-243; Townshend on Slander and Libel, 121; Pollock on Torts, 207-211. Assuming that the charge was maliciously made, it did not import anything unlawful, disreputable, or unprofessional. A professional man has a perfect moral and legal right to change the location of his office to his house, in his discretion, for any reason satisfactory to himself, whether to save expense or otherwise. What ground is there then for the legal inference that the plaintiff has been degraded and injured by the publication? It is not claimed that the charge, as published, would tend to injure him because the change, or the report of a change, of his office would diminish his professional business in amount or profits, and no case is made for special damages: 3 Bla. Com. *124; *Terwilliger v. Wands*, 17 N. Y. 54, 60; 72 Am. Dec. 420, 428-433.

But it is claimed that the words, "to save expense," are, under the circumstances set forth in the complaint, susceptible of a defamatory meaning, such as would be calculated to injure plaintiff in his private and professional character and standing in the community, and occasion loss or damage in consequence thereof. But we do not think such inference is warranted, or that the injury complained of could be reasonably construed or contemplated as the natural and proximate consequence of the publication, giving the language used its proper and legitimate interpretation; and the charge itself cannot be expanded or enlarged by simple averment: *Donaghue v. Gaffy*, 53 Conn. 43, 51; *Platto v. Geilfuss*, 47 Wis. 491; *Homer v. Engelhardt*, 117 Mass. 539; *Stone v. Cooper*, *supra*; *Walker v. Tribune Co.*, 29 Fed. Rep. 827. The allusion to the plaintiff in the article complained of may be conceded to be impertinent, and in bad taste; but the law of libel, however salutary as a remedy in proper cases, cannot be invoked to redress every breach of good morals or good manners in newspaper publications respecting individuals. The case falls within the rule in *Stone v. Cooper*, *supra*, and other cases above cited.

Order affirmed.

LIBEL. — For a general discussion with respect to the rule of damages in cases of libel, see extended note to *Terwilliger v. Wanda*, 72 Am. Dec. 426-436.

LIBEL. — An action may be maintained upon the publication of words libelous *per se*, without averring special damages resulting therefrom: *Iron Age etc. Co. v. Cradap*, 85 Ala. 519; *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 281.

LIBEL. — Where words published are not libelous *per se*, to maintain an action thereon it must appear that plaintiff suffered special damages by reason of such publication: *Press Co. v. Stewart*, 119 Pa. St. 684; *Johnson v. Bradstreet*, 77 Ga. 172; *Evening News Ass'n v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450.

LIBEL. — **WHAT PUBLICATIONS ARE LIBELOUS PER SE — RECENT CASES.** — The publication of words which accuse one of stealing are libelous *per se*: *Harman v. Cundiff*, 82 Va. 239; *Rosewater v. Hoffman*, 24 Neb. 222; the publication of words accusing a woman of unchastity is libelous *per se*: *Funk v. Beverly*, 112 Ind. 190; *State v. Moody*, 98 N. C. 671; a publication of one as "a skunk" is libelous *per se*: *Massere v. Dickens*, 70 Wis. 85; *Pledger v. State*, 77 Ga. 242. And, generally, words published accusing one of crime are libelous *per se*: *Harris v. Terry*, 98 N. C. 131; or subjecting such person to ridicule: *Stewart v. Swift Specific Co.*, 76 Ga. 280; 2 Am. St. Rep. 40, and note 43; *Bourressau v. Detroit etc. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320, and note 331.

LIBEL. — From a libelous publication the law implies both malice and damages: *Bryan v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

OSBORNE v. McMASTERS.

[40 MINNESOTA, 102.]

LIABILITY FOR NEGLIGENCE OF DUTY IMPOSED BY STATUTE OR ORDINANCE. —

One who neglects to perform a specific duty imposed upon him by a statute or municipal ordinance, for the protection or benefit of others, is liable to those, for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.

NEGLIGENCE IS BREACH OF LEGAL DUTY, whether the duty is one that is imposed by the rule of the common law requiring the exercise of ordinary care not to injure another, or one that is imposed by a statute designed for the protection of others.

MASTER IS CIVILLY LIABLE FOR NEGLIGENCE OF HIS SERVANT committed in the course of his employment, and resulting in injury to a third person, whether the act constituting the negligence is actionable on common-law principles, or is made such by statute.

ACTION for negligence. The opinion states the case.

Flandrau, Squires, and Cutcheon, for the appellant.

M. D. Munn, for the respondent.

MITCHELL, J. Upon the record in this case, it must be taken as the facts that defendant's clerk in his drug-store, in the

course of his employment as such, sold to plaintiff's intestate a deadly poison without labeling it "poison," as required by statute; that she, in ignorance of its deadly qualities, partook of the poison, which caused her death. Except for the ability of counsel and the earnestness with which they have argued the case, we would not have supposed that there could be any serious doubt of defendant's liability on this state of facts. It is immaterial for present purposes whether section 329 of the Penal Code, or section 14, chapter 147, Laws of 1885, or both, are still in force, and constitute the law governing this case. The requirements of both statutes are substantially the same, and the sole object of both is to protect the public against the dangerous qualities of poison. It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those, for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect. In support of this, we need only cite our own decision in *Bott v. Pratt*, 38 Minn. 323; 53 Am. Rep. 47.

Defendant contends that this is only true where a right of action for the alleged negligent act existed at common law; that no liability existed at common law for selling poison without labeling it, and therefore none exists under this statute, no right of civil action being given by it. Without stopping to consider the correctness of the assumption that selling poison without labeling it might not be actionable negligence at common law, it is sufficient to say that, in our opinion, defendant's contention proceeds upon an entire misapprehension of the nature and gist of a cause of action of this kind. The common law gives a right of action to every one sustaining injuries caused proximately by the negligence of another. The present is a common-law action, the gist of which is defendant's negligence, resulting in the death of plaintiff's intestate. Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case, the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is, that in the one case the measure

of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence; or, in other words, negligence *per se*. The action in the latter case is not a statutory one, nor does the statute give the right of action in any other sense, except that it makes an act negligent which otherwise might not be such, or at least only evidence of negligence. All that the statute does is to establish a fixed standard by which the fact of negligence may be determined. The gist of the action is still negligence, or the non-performance of a legal duty to the person injured.

What has been already said suggests the answer to the further contention that if any civil liability exists, it is only against the clerk who sold the poison, and who alone is criminally liable. Whether the act constituting the actionable negligence was such on common-law principles, or is made such by statute, the doctrine of agency applies, to wit, that the master is civilly liable for the negligence of his servant committed in the course of his employment, and resulting in injuries to third persons.

Judgment affirmed.

MASTER AND SERVANT. — A master is liable for damage occasioned by his servant in the exercise of the functions in which he is employed; and this is true whether the servant is guilty of a tort or mere negligence: *Fick v. Chicago etc. R'y Co.*, 68 Wis. 469; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512; and ordinarily a master is liable to third persons for any injuries and damage occasioned by his servants' negligence in the line of their duty: *Potulni v. Saunders*, 37 Minn. 517; *Texas etc. R'y Co. v. Davidson*, 68 Tex. 370; *Lakin v. Oregon etc. R. R. Co.*, 15 Or. 220; *Louisville etc. R. R. Co. v. Willis*, 83 Ky. 57; *Christian v. Irwin*, 125 Ill. 619.

NEGLIGENCE — BREACH OF A MUNICIPAL ORDINANCE. — Where a city, in pursuance of its charter, makes it unlawful to leave a team standing unfastened or unguarded in a street, any one injured by a violation thereof may recover from the violator: *Bott v. Pratt*, 33 Minn. 323; 53 Am. Rep. 47, and note 52-55; compare *Taylor v. Lake Shore etc. R. R. Co.*, 45 Mich. 74; 40 Am. Rep. 457; *Parker v. Barnard*, 135 Mass. 116; 46 Am. Rep. 450; *Salisbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 359; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603; *Heeny v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Philadelphia etc. R. R. Co. v. Ervin*, 89 Pa. St. 71; 33 Am. Rep. 726; *Potter v. Moran*, 61 Mich. 60.

NEGLIGENCE — DEFINITION OF. — Negligence cannot be defined by rules of evidence, but must be inferred from all the circumstances: *Danner v. South Carolina R. R. Co.*, 4 Rich. 329; 55 Am. Dec. 678; *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 124; 96 Am. Dec. 114; *Baltimore etc. R. R. Co. v. Brenig*, 25 Md. 378; 90 Am. Dec. 49; *Scott v. Hunter*, 46 Pa. St. 192; 84 Am. Dec. 542; *Beisiegel v. New York etc. R. R. Co.*, 34 N. Y. 622; 90 Am. Dec. 741; *Frankford T. Co. v. Philadelphia etc. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec.

708; *Gaynor v. Old Colony etc. R'y*, 100 Mass. 208; 97 Am. Dec. 98. Negligence has different meanings in relation to different causes of action; in some cases it means a very slight absence of care and prudence; in others, the absence of reasonable care and prudence; and again, such a want of care as will constitute gross negligence: *Baltimore etc. R. R. Co. v. Woodruff*, 4 Md. 242; 59 Am. Dec. 72. Negligence is a violation of an obligation which enjoins care and caution in what we do: *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239. Negligence consists in omitting to do something that a reasonable man would do, or in the doing of something which a reasonable man would not do, causing, unintentionally, mischief to another: *Pennsylvania etc. R. R. Co. v. Ogier*, 35 Pa. St. 60; 78 Am. Dec. 699; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573; *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91. A failure to perform a duty which is well defined is negligence: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542; and so negligence is the omission of care or caution in what we do; but where there is no legal duty to be cautious and vigilant, there can be no negligence in the legal sense of the term: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751; and negligence is in law a relative term, and implies the non-observance or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties, and circumstances surrounding the transaction: *Kelly v. Michigan O. R. R. Co.*, 65 Mich. 186; 8 Am. St. Rep. 876; *Hays v. Gainesville St. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

[40 MINNESOTA, 110.]

SUBSCRIPTION BY NUMBER OF PERSONS TO STOCK OF CORPORATION to be thereafter formed by them is, — 1. A contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation, and as such is binding and irrevocable from the date of the subscription, unless canceled by consent of all the subscribers before acceptance by the corporation; and 2. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation.

PROMOTER OF PROPOSED CORPORATION SOLICITING AND OBTAINING SUBSCRIPTIONS IS AGENT for the subscribers as a body to hold the subscriptions until the corporation is formed in accordance with the terms and conditions of the agreement, and then turn them over to it without any further act of delivery on the part of the subscribers; and therefore the delivery of a subscription to him is a complete delivery so as to make it *eo instanti* a binding contract.

EVIDENCE OF CONDITION ATTACHED TO DELIVERY OF SUBSCRIPTION INADMISSIBLE, WHEN. — Where a subscriber to the stock of a proposed corporation delivers the subscription to the promoter of such corporation, and other persons without knowing that there was any oral condition attached to such delivery also subscribe to the stock and pay in a large part of their subscriptions, and the corporation is organized and engages in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in

entire ignorance of such secret oral condition, such subscriber, when sued upon his subscription, will not be permitted to show, in defense to the action, that he attached a secret oral condition to the delivery of his subscription. In such case the principle applies that where a person by his words or conduct willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

ACTION to recover subscriptions to stock of a corporation.
The opinion states the facts.

C. M. Pond and James O. Pierce, for the appellant.

Ferguson and Kneeland, for the respondent.

MITCHELL, J. This was an action to recover installments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court, in connection with exhibits A and B attached to the complaint. Those material for present purposes are that, a scheme having been started to organize a manufacturing corporation with two hundred and fifty thousand dollars capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that if the citizens of Minneapolis would subscribe one hundred and ninety thousand dollars to the capital stock he would subscribe the remaining sixty thousand dollars, one Janney, a promoter, but not a subscriber to the stock of the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper (exhibits A and B), about April 1, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation, on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed five thousand dollars of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock on the same paper, to the aggregate amount, including defendant's subscription, of one hundred and ninety thousand dollars, of which over sixty-five thousand dollars has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining sixty thousand dollars, which he has paid up in full. All the conditions expressed in the written subscriptions (exhibit A) having been fully performed and complied with, the proposed corporation was afterwards, about April 25, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating

and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over seventy-five thousand dollars. During all this time the corporation had no notice or knowledge of any condition being attached to defendant's subscription, other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to the plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement, then had between him and Janney, that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of five thousand dollars; that Janney took the agreement from defendant on that express condition and understanding, and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case.

Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions and upon its creditors. The defendant of course does not attempt to controvert so elementary a rule as the one sug-

gested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is, that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question, it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: 1. It is a contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless canceled by consent of all the subscribers before acceptance by the corporation. 2. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation: 1 Morawetz on Private Corporations, secs. 47 et seq.; *Red Wing Hotel Co. v. Frederick*, 26 Minn. 112. Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows then that, considering the subscription as a contract between the subscribers, a delivery to Janney by a subscriber was a complete and valid delivery, so that his subscription became *eo instanti* a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow.

The defendant, however, attempts to bring the case within

the rule of *Westman v. Krumweide*, 30 Minn. 313, in which this court held that parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said Erle, J., in *Pym v. Campbell*, 6 El. & B. 370, in sustaining such a defense: "I grant the risk that such a defense may be set up without ground, and I agree that a jury should therefore look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases: *Benton v. Martin*, 52 N. Y. 570; *Sweet v. Stevens*, 7 R. I. 375.

Conceding the rule of *Westman v. Krumweide*, 30 Minn. 313, to its full extent, there are certain well-recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure for passing it over to the corporation when

organized, and clothed Janney with all the *indicia* of authority to hold and use it for that purpose without any other or further act on his part, untrammelled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground, under this state of facts, would be a fraud on others who have subscribed and paid for stock, upon the corporation which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: where a person, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all of the numerous cases cited by defendant's counsel, and failed to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are *Beloit etc. R'y Co. v. Palmer*, 19 Wis. 603, and *Ottawa etc. R'y Co. v. Hall*, 1 Brad. App. 612. But an examination of those cases will show that in neither did or could any question of estoppel arise, and in both the court held that the person to whom the instrument was delivered after signature was a stranger to it, so that it was strictly a delivery in escrow to a third party. Cases are cited where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of the condition. Such cases seem usually to proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger, the term "stranger," in the law of escrows, being used in opposition

merely to the party to whom the contract runs. It may well be doubted whether in such cases, where the instrument is complete on its face, the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is, that the court erred in admitting the evidence objected to, and for that reason a new trial must be awarded.

Order reversed.

CORPORATIONS—SUBSCRIPTIONS. — Each subscription to a common fund for a common purpose is a contract by each associate with his fellows, in consideration of similar contracts by them, to contribute to the common fund the amount subscribed, and when the full sum is subscribed and the association organized, raises a duty and liability on the part of each subscriber to pay the sum subscribed: *Edinboro' Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421, and note 423. So a subscription to joint stock is not only an undertaking with the company but with all the subscribers: *Miller v. Hanover etc. R. R. Co.*, 87 Pa. St. 95; 30 Am. Rep. 349.

SUBSCRIPTION TO STOCK—PAROL AGREEMENT. — A parol agreement made at the time of subscribing for stock, and inconsistent with the written terms of subscription, is incompetent and void: *Topeka Mfg. Co. v. Hale*, 39 Kan. 23.

ESTOPPEL—GENERAL DOCTRINE OF: See note to *Cook v. Walling*, 10 Am. St. Rep. 21-23.

ALLEN v. PIONEER PRESS COMPANY.

[40 MINNESOTA, 117.]

SUBJECT OF "ACT TO REGULATE ACTIONS FOR LIBEL," Laws of 1887, chapter 191, is sufficiently expressed in its title. All the provisions of the act relate and are germane to the subject expressed in the title, and proper to the full accomplishment of the object so indicated.

LAWS PUBLIC IN THEIR OBJECTS MAY BE CONFINED TO PARTICULAR CLASS OF PERSONS, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy. An act is not, therefore, invalid as being partial and unequal legislation merely because its provisions apply only to publishers of newspapers.

"ACT TO REGULATE ACTIONS FOR LIBEL," LAWS OF 1887, CHAPTER 191, DOES NOT CONFLICT WITH CONSTITUTIONAL PROVISION that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." Dickinson, J., dissenting.

GOOD FAITH, WHAT CONSTITUTES IN CASE OF LIBEL. — Mere belief in the truth of a publication is not sufficient to constitute good faith on the part of the publisher; he must be free from negligence as well as from improper motives in making it. It is his duty to take all reasonable precautions to verify the truth of the statement, and to prevent untrue and injurious publications against others. Upon the evidence in this case, it was held that the question of good faith should have been submitted to the jury.

ACTION for libel. The publication complained of was a newspaper report, alleged to be wholly false, with conspicuous head-lines, of a public altercation between plaintiff and his wife, in a theater, at 10:30 o'clock in the evening. The article stated that the altercation arose from the plaintiff's discovering his wife at the theater in company with another man. The complaint alleged that, more than three days before suit brought, he served notice on the defendant, specifying that the statements in the article were false and defamatory. Defendant's answer admitted the publication, and also the service of the notice, and alleged that in the next regular issue of its newspaper "it published a full and fair retraction of all the statements of said article which was complained of as libelous, in as conspicuous a place and print and type as was the said article complained of." The retraction stated, among other things, that the parties to the altercation were not the plaintiff and his wife, and that neither of them was even at the theater. The answer alleged that the article was published in good faith, and without any malice or ill-will towards the plaintiff and his wife. At the trial, defendant, to prove its good faith, called its reporter who furnished the article. He testified that about half an hour after midnight he met a young man who furnished him with the statements contained in the article, from which he then wrote the article, adding "professional embellishments," and at once telegraphed it to the defendant's office, where the head-lines were added, and the article was published next morning. The witness made no attempt to verify from other sources the statements so made to him, being satisfied that his informant was as good authority as he could have, although he knew the plaintiff, and knew him to be a man of good reputation, and never knew of his being mixed in anything of that sort. In regard to the plaintiff's wife, the witness said he had known her for more than a year, and "knew she was as nice a lady as there was in Minneapolis." He further stated that if his informant had not been so well known to him he would have hesitated, and re-

quired assurance and reassurance; but he knew his informant was a man of truth and accuracy, and fully believed his assurances that the story told was true in every particular. He testified that his idea in writing up the report, and sending it on at once, was to get it out as quickly as possible. He had an idea that the other papers would have been "scooped" the next morning, and that the thing had not been circulated much, because he had not heard it before. He would not state that he had not met plaintiff at the latter's place of business about 11 o'clock on the evening of the performance, though he thought the chances nine out of ten that he was not there. The plaintiff, however, testified in rebuttal that he saw the witness that evening at his place of business about 10:30 to 11 o'clock, and that they exchanged a few words. The court directed a verdict for the defendant, and a new trial being refused, the plaintiff appealed.

Miller and Young, for the appellant.

Flandrau, Squires, and Cutcheon, for the respondent.

MITCHELL, J. The questions raised by this appeal involve, first the validity, and second the construction, of chapter 191, Laws of 1887, entitled "An act to regulate actions for libel." The act is claimed to be unconstitutional on three grounds. The first is, that the subject of the act is not expressed in the title, as required by section 27, article 4, of the constitution. This section has been before this court for construction in so many cases, beginning with *County of Ramsey v. Heenan*, 2 Minn. 281 (330, 339), and ending with *Minnesota Loan and Trust Co. v. Beebe*, 40 Id. 7, at the present term, that all that need be said on this point is, that all the provisions of the act relate and are germane to the subject expressed in the title, and proper to the full accomplishment of the object so indicated: *State v. Kinsella*, 14 Minn. 395 (524); *State v. Cassidy*, 22 Id. 312, 322; 21 Am. Rep. 765.

2. The second objection to the act is, that it is partial or class legislation, in that it gives to publishers of newspapers certain rights and immunities not given to other defendants in actions for libel. It does not follow that it is unconstitutional because its provisions are limited to the publishers of newspapers. Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public

policy growing out of the condition or business of such class. Such distinctions are being constantly made, as in the case of minors, married women, common carriers, railroad companies, and the like. This kind of legislation is not confined, as plaintiff seems to contend, to cases involving the exercise of what is termed the "police power" of the state. For example, it may be public policy to give to laborers a lien or other preference for the collection of their wages, not given to other creditors; or to give a lien to laborers in one business, while it would be neither practicable nor politic to give it to laborers in some other employment. So long as a law applies equally to all engaged in that kind of business, treating them all alike, subjecting them to the same restrictions, and giving them the same privileges under similar conditions, there it is public in its character, and not subject to the objection of being partial or unequal legislation, provided of course, as already stated, the distinction made by it is based on some reason of policy, and is not purely arbitrary: Cooley's Constitutional Limitations, 481 et seq. The act under consideration applies alike to all publishers of newspapers. And in view of the nature of the business in which they are engaged, and the fact that newspapers are the channels to which the public look for general and important news, and that even in the exercise of the greatest care and vigilance, and actuated by the best of motives, they are liable through honest and excusable mistake to publish what may afterwards prove to be false, we cannot say that it is either arbitrary or without reason of public policy to make such provisions as are made by this act for the special protection of newspaper publishers when sued for libel.

3. The third, and by far the most serious, objection urged against this act is, that it conflicts with section 8, article 1, of the constitution, which provides that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." It is contended that the act in question is unconstitutional, for the reason that it deprives a person of an adequate remedy for injuries to his reputation, because in certain cases it limits his right of recovery to special damages of certain kinds, specified in the second section, and prohibits the recovery of general damages,—that is, damages to character or reputation,—which the law presumes, without proof, from the mere fact of the falsity of the publication; and hence, in such cases, if a person is unable to prove any special or pecuniary damages,

there could be no recovery at all. The question is not without difficulty, or free from doubt. This act undoubtedly assumes to introduce an important and radical change in the law of libel, and as legislation of the kind is comparatively new, judicial precedents are almost wanting. The parent act for the protection of newspaper publishers when sued for libel seems to be chapter 96 of 6 and 7 Victoria, known as Lord Campbell's act. But this merely provided that the defendant might plead that the libel was published without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he published in such newspaper a full apology, and that at the same time he filed this plea, the defendant might pay into court a sum of money by way of amends for the injury. This plea was allowed in mitigation of damages, and the payment into court operated as a tender. In Connecticut, in 1855, an act was passed which, although not so limited by its terms, was evidently designed for the protection of newspaper publishers, and which provided that "in every action for libel, the defendant may give proof of intention; and unless the plaintiff shall prove malice in fact, he shall recover nothing but his actual damages proved and specially alleged in the declaration." Although very different in form, it will be observed that, so far as the question now being considered is concerned, this statute is, in effect, much the same as ours, assuming that "actual damages," as defined in the second section, can be given a construction that will cover all special damages. This act has been twice before the supreme court of Connecticut, first in *Moore v. Stevenson*, 27 Conn. 14, and next in *Hotchkiss v. Porter*, 30 Id. 414. While in both cases the construction, rather than the constitutionality, of the act seems to have been the question presented to the court, yet in passing upon the first, they seem to have had the latter in mind, and succeeded in giving it a construction which, in their opinion, would be consistent with its validity. They seem to have had some difficulty in doing this, and it is very evident that the act did not commend itself very strongly to the favor of the judicial mind. Our act was copied from an act passed in Michigan in 1885, except that the latter expressly excepted from its operation publications involving a criminal charge. This act was recently before the supreme court of that state in the case of *Park v. Detroit Free Press*, Mich., Nov. 28, 1888, in which it was held unconstitutional on the very ground here

argued by plaintiff. While the views of that learned court, and especially of the eminent jurist who wrote the opinion in that case, are entitled to very great weight, yet we think they hardly have the authority of a decision of the question, because it was really not in the case, inasmuch as the court held that the publication involved a criminal charge, and hence was not within the operation of the statute. We are therefore compelled to consider the question mainly upon principle as *res integra*, which it certainly is in this state.

The guaranty of a certain remedy in the laws for all injuries to person, property, or character, and other analogous provisions, such as those against exacting excessive bail, imposing excessive fines, inflicting cruel and inhuman punishments, and the like, inserted in our bill of rights, the equivalents of which are found in almost every constitution in the United States, are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution. There is unquestionably a limit in these matters, beyond which, if the legislature should go, the courts could and would declare their action invalid. But inside of that limit there is, and necessarily must be, a wide range left to the judgment and discretion of the legislature, and within which the courts cannot set up their judgment against that of the legislative branch of the government. These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment rather than as absolute limitations of their power. And in determining whether, in a given case, a statute violates any of these fundamental principles incorporated in the bill of rights, it ought to be tested by the principles of natural justice rather than by comparison with the rules of law, statute or common, previously in force.

Again, it must be remembered that what constitutes "an adequate remedy" or "a certain remedy" is not determined by any inflexible rule found in the constitution, but is subject to variation and modification, as the state of society changes. Hence a wide latitude must, of necessity, be given to the legislature in determining both the form and the measure of the remedy for a wrong. Now, at common law the remedy allowed to a person injured by a libel was,—1. Special damages for

every injury of a pecuniary nature resulting from the wrong, which he had to both plead and prove; and 2. General damages, that is, damages to his standing and reputation, which the law presumed, without proof, from the fact of the publication of a libel actionable *per se*. Moreover, malice was the gist of every action for libel; either malice in fact, consisting of improper and unjustifiable motives, or constructive malice, which the law presumed, without proof, from the fact of the falsity of the publication. Evidence of intention, that is, of the absence of malice in fact, was always admissible, where the communication was privileged, in justification, and where it was not privileged, in mitigation of damages. A retraction of the libel was also always admissible in mitigation. In effect, this statute but extends this rule of evidence so as to permit evidence of intention,—good faith,—coupled with a full retraction, not merely in mitigation of damages, but to prevent the recovery of general damages, as distinguished from special damages for injuries of a pecuniary nature. Now, in an action for libel, the object, so far at least as general damages is concerned, is not merely to obtain redress in the shape of pecuniary compensation, which is frequently but a secondary consideration, but also — which is usually of much greater importance — of vindicating the plaintiff's character by openly challenging his accusers to proof of their assertions, and of establishing their falsity, if they be false. Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. Indeed, where there has been perfect good faith, and an entire absence of improper motives, in the publication of a libel, and no special or pecuniary injury has resulted, an action for damages, brought after such a full and frank retraction and apology, is in a majority of cases purely speculative. It may be said that a retraction is not a complete remedy for injury to reputation, because even retracted falsehood may be repeated without the retraction; but the same may be said of it even after the falsity of the charge is established by a judgment for damages. It is also true that a retraction is not the remedy in the law guaranteed by the constitution, and, if the statute proposed to substitute it as a redress for pecuniary injuries, it could not be sustained. But if there was an entire absence of either

negligence or improper and unjustifiable motives, but on the contrary perfect good faith on part of the publisher of the libel, and if he has done all that can reasonably be done in redressing the wrong, so far as it has affected a party's character, by publishing a full retraction, what principle of reason or natural justice is violated by limiting the recovery of pecuniary damages to the pecuniary injuries which he has sustained? Or if good faith can be shown in mitigation of damages, what constitutional provision is violated by permitting it to be proved in connection with a retraction, so as to prevent altogether the recovery of money damages for the presumed injuries to reputation which are not at all pecuniary in their nature, and which have already been redressed, as far as they can be, by the retraction? A court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case; and after all the consideration that we are able to give to the subject, we are unable to say that the legislature has transcended its constitutional powers in imposing these restrictions and limitations upon the legal remedy of plaintiffs in actions for libel, or that by so doing they have deprived any one of "a certain remedy in the laws for injuries or wrongs received by him in his person, property, or character," within the meaning of the constitution.

We have assumed that under this act a party is still allowed to recover pecuniary compensation for all injuries pecuniary in their nature, which he may have sustained by the libel. Section 2, in defining "actual damages," limits them to damages in respect to property, business, trade, profession, or occupation. It may be suggested that there may be some cases of pecuniary injury which this would not reach, but we are of opinion that by a liberal but allowable construction, the definition referred to may be made to cover all cases of special damages; and if so, we ought to adopt such construction rather than hold the act invalid.

4. The next question is, whether upon the evidence the question should have been submitted to the jury whether "the article was published in good faith; that its falsity was due to mistake or misapprehension of the facts." This depends upon what is meant by the expression "in good faith," as used in this connection. We may assume that the act was designed to protect honest and careful newspaper publishers. It is not to be presumed that the legislature intended to make

so radical a change in the law of libel as to make mere belief in the truth of the article the test of good faith. If so, they have introduced a very dangerous principle, which virtually places the good name and reputation of the citizen at the mercy of the credulity or indifference of every reckless or negligent reporter. Good faith requires proper consideration for the character and reputation of the person whose character is likely to be injuriously affected by the publication. It requires of the publisher that he exercise the care and vigilance of a prudent and conscientious man, wielding, as he does, the great power of the public press. There must be an absence, not only of all improper motives, but of negligence, on his part. It is his duty to take all reasonable precautions to verify the truth of the statement, and to prevent untrue and injurious publications against others. The extent and nature of these precautions will depend upon and vary with the circumstances of each case, such as the nature of the charge, the previous known character and standing of the person whom it affects, the extent to which the report has already gained circulation and publicity. If it is a piece of news in which the public may be presumed to have a lawful interest, good faith might permit a line of action which would not be permissible in the case of an item of mere scandal of no legitimate interest to the public. If a publisher of a newspaper, for the sake of gratifying a depraved public taste, or for the sake of being considered "newsy," and "scooping" other newspapers, should recklessly or even negligently publish a piece of scandal about another, without taking such precautions to verify its truth as would be taken by a conscientious and prudent man under like circumstances, then he would not be acting in good faith, within the meaning of this statute, even although he may have a belief that the publication is true. Such conduct would not be a performance of his legal duty in guarding against wrongfully injuring the reputation of others. If, on the other hand, he take all such reasonable precautions, and has then a reasonable and well-grounded belief in the truth of the statement, and then publishes it as a matter of news, and it nevertheless proves to be false, he acts in good faith. This is what we think the statute means, and is all that any honest and fair-minded newspaper publisher will demand: See *Moore v. Stevenson*, *supra*.

In view of another trial of this action, it would be improper to discuss the evidence, or characterize the conduct of the

reporter who transmitted this article to the defendant for publication. All that it is proper to say is, that, applying the law as we have construed it to the evidence, we are of the opinion that the question of good faith in publishing the article should have been submitted to the jury.

Order reversed.

STATUTES — GENERAL OR LOCAL APPLICATION. — A statute professing in general terms to regulate municipal affairs in the appointment of commissions is general, and is not rendered local by the mere fact that but one commission exists to which such statute will apply: *Van Riper v. Parsons*, 40 N. J. L. 123; 29 Am. Rep. 210; compare *Flint River etc. Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593. The constitutional provision, that no special law may be enacted where a general law can be made applicable, is only by way of caution to the legislature; and except in such cases as are expressly enumerated in the constitution, the legislature is the sole judge as to whether a law general in its nature is possible: *Davis v. Gaines*, 48 Ark. 370. A statute, general in form, is not to be held as special, because some unrepealed local statute intervenes and prevents it from having a general effect: *Evans v. Phillips*, 117 Pa. St. 226. An act authorizing cities under special charters, containing between thirty and fifty thousand inhabitants, to construct a system of sewerage, etc., is not a special law: *Rutherford v. Hamilton*, 97 Mo. 543; *Rutherford v. Heddens*, 82 Id. 388. But an act applying to the counties of a state is unconstitutional, where one county is excepted from its operation: *State v. Board etc. of Hudson County*, 5 N. J. L. 82; *State v. Philbrick*, 50 Id. 581.

STATUTES — TITLE AND SUBJECT-MATTER. — Where the object of an act is fully expressed in its title as passed, the form of such title at any other time during the different stages of legislation is immaterial: *Attorney-General v. Rice*, 64 Mich. 385. Where a title fully expresses the subject of the act, and an act entitled a supplement thereto has a title sufficiently expressing any subject within the purview of the original, and contains no provisions not germane thereto, the supplementary act is constitutional: *In re Borough of Pottstown*, 117 Pa. St. 538. Every act shall embody but one subject, and such matters as are properly incident to and connected therewith; and for instances of the application of this rule, see *City of Evansville v. State*, 118 Ind. 426; *Butler v. Chambers*, 36 Minn. 69; *Missouri Pacific R'y v. Merrill*, 40 Kan. 404; *People v. Standerfer*, 125 Ill. 600; *Detroit v. Wabash etc. R'y Co.*, 63 Mich. 712; *Skinner v. Wilhelm*, 63 Id. 568; *Ragio v. State*, 86 Tenn. 272; *State v. Hallock*, 19 Nev. 384; *State v. Atherton*, 19 Id. 332. An act, prescribing provisions with reference to matters not expressed in the title or germane to matters expressed therein, is void and unconstitutional: *Waltz v. McCollom*, 83 Ky. 361. Yet the constitutional provision, that a bill must not contain more than one subject, which must be clearly expressed in the title, must receive a reasonable construction, and whenever a matter contained in an act can be fairly considered germane to the subject expressed in the title, it must be considered sufficient: *Dallas v. Redman*, 10 Col. 297; compare the recent case, *Kreiger v. Shelby*, 84 Ky. 66, as to unconstitutionality of statutes for defective titles.

HANNEN v. PENCE.

[40 MINNESOTA, 127.]

GENERAL DENIAL IS ALWAYS QUALIFIED OR LIMITED BY ANY ADMISSION of inconsistent allegation in the pleading.

ERROR IN DENYING MOTION TO DISMISS ON GROUND OF FAILURE OF PROOF IS CURED, if the necessary proof is afterwards supplied, even though by the defendant; and for the purpose of determining whether a verdict for the plaintiff is sustained by the evidence, the court will consider the whole evidence in the case, whenever and by whomsoever introduced.

ORDER OF PROOF IS LARGELY MATTER OF DISCRETION WITH TRIAL COURT, and therefore evidence which is properly a part of the plaintiff's case in chief may be permitted to be introduced out of its regular order, or even by examination of defendant's witnesses, though not strictly cross-examination, provided the evidence is competent and material, and the defendant is not surprised or otherwise unfairly prejudiced by the departure from the regular order of proof.

LIABILITY FOR NEGLIGENCE IN ERECTING AND MAINTAINING ROOF OF UNSAFE CONSTRUCTION CANNOT BE EVADED by turning over possession of the building to a tenant; and in an action to recover damages for such negligence, it is therefore immaterial whether the actual possession of the building was in the defendant or in his tenants.

LIABILITY OF OWNER FOR INJURY FROM SNOW FALLING FROM NEGLIGENTLY CONSTRUCTED ROOF. — The owner of a lot fronting on a city street, who erects thereon a building with a roof so constructed that ice and snow collecting on it naturally falls upon the sidewalk, and injures a person traveling on such sidewalk with due care, is liable, without other proof of negligence, for the injury. And it is no defense in such case that he exercised all the care he could to remove the snow and ice from the roof. The gist of the negligence consists, not in the management of the roof, but in its improper and unsafe construction.

ERROR WITHOUT PREJUDICE IS NOT GROUND FOR REVERSAL of a judgment.

VERDICT OF FIVE THOUSAND FIVE HUNDRED AND FIFTY DOLLARS FOR PERSONAL INJURIES IS NOT EXCESSIVE, where the evidence shows the injuries to be serious and permanent.

ACTION for personal injuries. The opinion states the case.

Charles P. Barker, for the appellant.

James O. Pierce, and Arctander and Arctander, for the respondent.

MITCHELL, J. By numerous assignments of error and an elaborate brief, counsel for defendant have made the most of a poor case; but an examination of the record satisfies us that there is really nothing in this appeal. The action was one for damages for personal injuries caused by ice and snow from the roof of defendant's building falling on plaintiff while traveling on the sidewalk. Although the complaint contains some other allegations on the matter of negligence, yet the

gist of the negligence alleged and proved was the erection and maintenance of a building with a roof so unsafely and improperly constructed and shaped that snow and ice collecting on it would inevitably, and in the natural course of things, be liable to slide down and fall upon the sidewalk below, to the great danger of foot-passengers.

Before considering the main questions in the case, it is necessary to refer to some rules of practice and pleading, as to which counsel seem to have fallen into error. And first, a general denial, like any other, is always qualified or limited by any admission or inconsistent allegation in the pleading. Second, although a motion by defendant to dismiss, when plaintiff rests on the ground of failure of proof, be erroneously denied, yet if the necessary proof is afterwards supplied, although by defendant, the error is cured; and for the purpose of determining whether a verdict for plaintiff is sustained by the evidence, the court will consider the whole evidence in the case, whenever and by whomsoever introduced. Third, the order of proof is largely a matter of discretion with the trial court, and hence evidence which is properly a part of plaintiff's case in chief may be permitted to be introduced out of its regular order, or even by examination of defendant's witnesses, although not strictly cross-examination; provided only the evidence is competent and material, and the defendant is not surprised or otherwise unfairly prejudiced by the departure from the regular order of proof. We state this with reference to the evidence elicited on cross-examination of defendant's witness—the janitor in charge of the building—that he was employed by the defendant. Fourth, the allegation of the complaint that at the time of the injury the defendant was in the possession of the premises, and had control of its roof, was not put in issue by defendant. His answer admits that he erected the building, and was the owner of it, which implies that he has the possession and control, in the absence of any affirmative allegation that he has parted with it. Moreover, in connection with this admission, he alleges that he at all times kept the roof as clean and free from snow and ice as practicable and possible, which amounts, by necessary implication, to an admission that he had the control of it. And even if this fact had been in issue, it was sufficiently established by the evidence of the janitor in charge, already referred to. But beyond and above all this, the question whether the actual possession of the building was in defendant or in

his tenants was wholly immaterial. As already remarked, the gist of the negligence charged was the erection and maintenance of a roof of improper and unsafe shape. So far as damages from this cause alone were concerned, he would in any event be liable, and he could not evade it by turning over possession of the building to his tenants: *Cahill v. Eastman*, 18 Minn. 292 (324); 10 Am. Rep. 184; *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318.

But coming, now, to the main question in the case, the evidence conclusively and without conflict establishes the following facts: The building in question, Pence Opera House, fronts on Hennepin Avenue, one of the main public thoroughfares in the city of Minneapolis. The front wall, as is usual in business blocks, comes out flush with the line of the street. The building is sixty feet front on Hennepin Avenue, and two hundred feet deep on Second Street. The roof is what is called a "hipped" or "peaked" roof, running up from all four sides of the building to a peak or ridge in the center, which is from fifteen to eighteen feet higher than the outer or lower edge of the roof. The slope or pitch is quite steep, being a little less than "a one-third pitch"; that is, about one inch in three. This slope is, of course, downwards towards the street, and extends to near the edge of the outer wall of the building, and from thence there projects a horizontal cornice, extending beyond the building, over the sidewalk, some two or three feet. In this cornice is a gutter, almost immediately above the outer edge of the wall of the building, about five inches deep and a foot wide. In the natural order of things, by reason of alternate thawing and freezing in the winter-time, this gutter becomes filled with ice; and when snow or ice has accumulated on the roof, and a thaw ensues, according to the natural law of gravitation the snow and ice slide down the steep pitch of the roof, and are carried by the momentum which they thus acquire across the horizontal cornice, and fall upon the sidewalk below, — thus exposing foot-passengers to the risk of great bodily injury. We say this conclusively appears. We would be justified in so saying, even if there was no direct and positive evidence that any such results had ever in fact occurred; for, with the shape of this roof in proof, according to natural laws, under the climatic conditions of the country, such results must inevitably follow. But the positive and uncontradicted evidence is, that this is just what has been

accustomed to happen, although fortunately, so far as appears, no one was ever injured before. On the day when the accident occurred it was thawing, and from the causes already stated the ice, snow, and water from the roof were from time to time falling upon the sidewalk. The plaintiff, while walking along the sidewalk in front of the building, was struck on the head by some of this falling ice and snow, and thereby received the injuries complained of.

Counsel for the defendant seem to have tried this case upon the theory (and most of their assignments of error here proceed upon the same theory) that defendant's liability depended upon the question whether, taking this building constructed just as it was, he exercised reasonable care and diligence in the care and management of it, in the way of removing the snow and ice from the roof, ignoring altogether the question of negligence in the construction of such a building. This fundamental fallacy runs all through their argument. But the very act of maintaining a building with a roof constructed as this was, so that snow and ice collecting on it would naturally fall into the adjoining highway, is a nuisance, and constitutes negligence *per se*, for which the owner will be liable to any one injured thereby while lawfully passing along the sidewalk. The law gives a man no more right to construct a building in this way than it does to purposely throw snow and ice upon passers-by. As was said in *Shipley v. Fifty Associates, supra*, the case depends on the same rules, and is to be decided upon the same principles, as if it raised a question between adjoining proprietors. A man has no right to construct his roof so as to discharge upon his neighbor's land, water, ice, or snow which would not naturally fall there, and the persons of those who are lawfully traveling a street are certainly as much entitled to protection as the property of an adjoining owner. It was not a question of defendant's reasonable care and diligence in the management of his roof, but of his right to erect and maintain it at all in that shape. It would not avail him to say that he did all he could to prevent the consequences; he had no right at all to build it in that way. His act was an attempt to extend his right as proprietor beyond the limits of his own property, at the expense of the safety of the traveling public. He was bound at his peril to keep the ice and snow that collect on his own roof within his own limits; and if the shape of his roof is such as necessarily or naturally to throw it upon the street, he is

responsible for all damages, precisely as if he had under the same circumstances thrown it upon the premises of an adjacent owner. This doctrine has been fully recognized by this court as the law in *Cahill v. Eastman*, *supra*, and *Knapheide v. Eastman*, 20 Minn. 432 (478), and is abundantly supported by authorities elsewhere: *Shipley v. Fifty Associates*, *supra*; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Fletcher v. Smith*, L. R. 2 App. Cas. 781.

As we view the evidence, there was really no question to go to the jury, except that of plaintiff's contributory negligence; and hence the defendant cannot complain that the court also submitted to them the question of his negligence in the construction of the building. It is unnecessary to consider in detail all the numerous instructions of the court on that subject. They are all in substantial accord with the views of the law which we have expressed.

To establish contributory negligence, defendant introduced evidence tending to show that boxes and kegs had been put across the sidewalk on each side of the building to keep people from passing in front of it, and to warn them that it was dangerous to do so, but the plaintiff negligently disregarded this; also that some of the by-standers called to him not to go in front of the building, but that he also disregarded this. We have examined the evidence on this point, and find that it is conflicting as to whether such obstructions were placed across the walk; also that, assuming that they were, it was done in such a way that its significance might be equivocal, even to a prudent man. It is admitted that there were no boards or ropes stretched across from one box or keg to another, and a person might not unnaturally assume, even if he noticed them, that it was merely one of the common cases of business houses, for purposes of their own, partially obstructing the sidewalk with such articles. Plaintiff swears he did not see or hear anything to warn him that it was unsafe to pass in front of the building. Upon the whole evidence, we think the question of contributory negligence was one to be submitted to the jury, under proper instructions from the court. This the trial judge did in a way that certainly the defendant cannot complain of, for he refused to instruct the jury that contributory negligence was a matter of defense, and that upon this question the burden of proof was on the defendant.

The defendant assigns as error the action of the court in striking out the answer of a witness to a question whether

plaintiff heard a by-stander call to him to get out of the way, the answer being: "Yes, sir; I should think he did." While it was competent to prove any act of plaintiff or any fact tending to show that he did hear, we hardly think it was proper for a witness to give his mere opinion as to whether he heard. But, at most, striking out the answer was error without prejudice; for during the succeeding examination of the witness, every fact was elicited that could have any legitimate bearing on the matter.

Complaint is made that the verdict is excessive. The damages are large, but it must be remembered that if the evidence is to be believed (which was for the jury), plaintiff's injuries are serious and permanent. The verdict is not so large as to indicate any passion, prejudice, or misconduct on the part of the jury, and the trial court having refused to set it aside, we certainly cannot disturb it. This covers all the assignments of error, except a few which are so clearly without merit as not to be entitled to special consideration.

Order affirmed.

NEGLIGENCE OF THE OWNER OF A BUILDING in permitting his house to be covered by a roof so constructed that snow and ice naturally collects thereon, and falls upon the sidewalk below, makes such owner liable to such as are injured by reason of such negligence: *Smethurst v. Proprietors etc. Church*, 148 Mass. 261; *ante*, p. 550, and note 555.

HARMLESS ERROR OR ERROR WHICH WORKS NO INJURY TO THE COMPLAINANT: See *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279, and note; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182, and note.

VERDICTS, EXCESSIVE: See *Virginia M. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note 882; and for circumstances under which a verdict for five hundred dollars was not excessive for slight personal injuries, see *East Line etc. R. R. Co. v. Lee*, 71 Tex. 538.

FONTAINE v. BUSH.

[40 MINNESOTA, 141.]

STATUTE OF FRAUDS — DENIAL OF CONTRACT SUFFICIENT TO MAKE DEFENSE OF AVAILABLE. — A denial by a defendant in his answer of the making of the contract upon which the action is brought is sufficient to enable him to avail himself of the defense that the agreement was void under the statute of frauds.

ACCEPTANCE OF GOODS, TO BE EFFECTUAL TO AVOID EFFECT OF STATUTE OF FRAUDS as to oral agreements for the sale of personal property, must be something more than a mere receipt of the goods delivered; in the case of an agreement void by force of the statute, an effectual acceptance can be inferred only from some act or course of conduct on the part of the

buyer manifesting a present intention to receive the goods in performance of the agreement, and to appropriate them as his own. And even if the buyer at the time of making the void agreement directs that the goods be delivered to a designated common carrier for the purpose of being transported to the place where they are to come into his own hands, and the goods be so delivered and transported, this alone does not bring the case within the statutory exception requiring an acceptance of the goods.

ACTION for goods sold. The opinion states the case.

G. D. Emery, for the appellants.

Ferguson and Kneeland, for the respondents.

DICKINSON, J. This action is for the recovery of the price (more than fifty dollars) of a large quantity of potatoes, alleged to have been sold by the plaintiffs to the defendants at an agreed price. The answer denied the sale. The court, trying the cause without a jury, found in favor of the defendants, upon the ground that the case was within the statute of frauds.

The mere oral agreement was void under the statute, and the denial of the sale in the answer was sufficient to enable the defendants to avail themselves of that defense: *Tatge v. Tatge*, 34 Minn. 272. The case justified the finding of the court that there had been no acceptance on the part of the defendants satisfying the requirement of the statute. The circumstances to which attention should be directed in this connection are shown to have been as follows: The agreement was made orally, at Crookston, between the plaintiffs and one Storms, an agent of the defendants. The agreement was for the sale of a car-load of potatoes, at forty-five cents a bushel, delivered on the track at Crookston, billed to the defendants at Minneapolis. The plaintiffs were authorized to draw on the defendants for the price when the potatoes were shipped. The potatoes were shipped by rail a few days after the agreement. When the car reached Minneapolis the defendants found the potatoes badly frozen. Thereupon the defendants telegraphed to the plaintiffs, informing them of that fact, and asking: "Shall we put in cellar for you?" The plaintiff responded by telegraph: "Handle to best advantage; cost forty here." The defendants then put the potatoes in a warehouse, picked them over, and sold them. After a part of them had been sold, the defendants remitted what had been received for them to the plaintiffs, with a letter indicating that they were thus dealing

with the potatoes, not as purchasers, but for the benefit of the plaintiffs.

“Unless the buyer accepts and receives” is the language of our statute of frauds, specifying cases excepted from its operation. The acceptance which, under the statute, is effectual to bind the purchaser is distinguishable from a mere receipt of goods delivered, although the latter might be sufficient to transfer the title, in case there were a valid contract. In the case of an agreement void by force of the statute, an effectual acceptance can be inferred only from some act or course of conduct on the part of the buyer manifesting a present intention to receive the goods in performance of the agreement, and to appropriate them as his own. It implies on the part of the buyer, or of an authorized agent, the exercise of volition,—the determination to receive as his own, by purchase, property to the purchase of which he was not before bound: *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199; *Simpson v. Krumdick*, 28 Minn. 352; *Caulkins v. Hellman*, 47 N. Y. 449; 7 Am. Rep. 461; *Cooke v. Millard*, 65 N. Y. 352, 367; 22 Am. Rep. 619; *Atherton v. Newhall*, 123 Mass. 141; 25 Am. Rep. 47.

Hence a delivery to a common carrier not designated by the buyer will not satisfy the requirement of the statute. That does not show an acceptance on the part of the vendee: *Simmons Hardware Co. v. Mullen*, 33 Minn. 195. In view of the proposition that acceptance thus involves the election and action of the buyer, or of some authorized agent, binding him to an agreement which was before void, it logically follows that, even if the buyer, at the time of making the void agreement, directs that the goods be delivered to a designated common carrier for the purpose of being transported to the place where they are to come into his own hands, and the goods be so delivered and transported, this alone does not bring the case within the statutory exception requiring, not only a receipt, but an acceptance of the goods; and so is the current of authority: *Leake on Contracts*, 284; *Acebal v. Levy*, 10 Bing. 376; *Norman v. Phillips*, 14 Mees. & W. 277; *Smith v. Hudson*, 6 Best & S. 431, 445, 448; *Ricard v. Moore*, 38 L. T., N. S., 841; *Meredith v. Meigh*, 22 L. J. Q. B. 401; *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545; *Rodgers v. Phillips*, 40 N. Y. 519; *Smith v. Brennan*, 62 Mich. 349; 4 Am. St. Rep. 867. The mere fact that the purchasing party so directs does not justify the inference that it is intended thereby to invest such carrier with authority to bind the purchaser by an acceptance of the

goods as a performance of the agreement pursuant to which they are delivered.

But in this case it cannot be taken as a fact that the defendants did appoint the carrier to whom the potatoes were to be delivered, although the appellants claim that such was the necessary result of the agreement to deliver on the track at Crookston; because, as they say, there was but one railroad line there. But this is not shown in the case to be the fact. In any view of this case, the receiving of the property by the railroad company for transportation was no act of acceptance on the part of, or by the authority of, the defendants, such as is required by the statute; and upon the arrival of the car at Minneapolis, there having as yet been no acceptance on the part of the defendants, and no valid contract, it was in their power to refuse to accept the property, and thus to make valid the oral agreement.

Several of the appellants' assignments of error are based upon the theory which we have considered above, and deem untenable,—that is, that a valid contract of sale, prior to the arrival of the car at Minneapolis, was shown. The condition of the potatoes when they reached Minneapolis, the defendants' communications to the plaintiffs respecting the same, and the manner in which they were disposed of, were properly received as a part of the *res gestæ*, affecting the question of acceptance: *Caulkins v. Hellman*, *supra*. In connection with these facts indicative of non-acceptance, there was no error in receiving the testimony of one of the defendants stating directly that they did not accept the potatoes as their property: *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Mannheim*, 24 Id. 193.

Order affirmed.

STATUTE OF FRAUDS — PLEADING. — As to the manner of taking advantage of the statute of frauds as a defense, see *Feeny v. Howard*, 79 Cal. 525; *ante*, p. 162, and cases collected in note 171.

SALES — DELIVERY AND ACCEPTANCE TO TAKE A VERBAL SALE OF GOODS OUT OF THE STATUTE OF FRAUDS: See *Smith v. Brennan*, 62 Mich. 349; 4 Am. St. Rep. 867, and note 870.

STATUTE OF FRAUDS. — A mere receipt, not under seal, "for forty dollars for my share of the lot" in dispute, is not sufficient to divest the interest of the alleged vendor under the statute of frauds: *Mason v. Ammon*, 117 Pa. St. 127.

CIGAR-MAKERS' PROTECTIVE UNION v. CONHAIM.

[40 MINNESOTA, 243.]

DEVICE ADOPTED BY TRADE UNION, WHEN NOT LEGAL TRADE-MARK. — A device or symbol adopted by a cigar-makers' union, having many thousand members, to be placed on boxes of cigars made by such members, which does not indicate by what persons the cigars are made, but only that they are made by some member of such union, where the right to use it belongs equally to each of the members, and continues only so long as he remains a member, is not a legal trade-mark, — 1. Because it is not used to indicate by what persons the articles were made; 2. Because its use is not enjoyed as an incident to any business; and 3. Because there is no exclusiveness in its use or in the right to use it.

TRADE-MARK. The opinion states the case.

T. R. Palmer, for the appellants.

E. St. Julien Cox, for the respondent

GILFILLAN, C. J. This case stands on a demurrer to the complaint. The only ground of demurrer necessary to consider is, that the complaint does not state facts sufficient to constitute a cause of action. Whatever may be said or thought of the conduct of the defendants, in the matter of honesty and good morals, in using the peculiar symbol adopted by the plaintiff and those it represents, to indicate the goods manufactured by them, the case must be decided on considerations of strict legal right of the plaintiff in that symbol as a thing of property.

From the allegations of the complaint it appears that cigar-makers throughout the United States, amounting to many thousand in number, have joined themselves into local associations called "local unions," of which this plaintiff is one, it being incorporated for the purpose of such association or union, and that the various local unions are in some way joined together, forming what is called the Cigar-makers' International Union; and that the latter, and the state, or local, unions have devised and adopted a certain symbol, which the complaint claims to be a legal trade-mark for the exclusive use and protection of the cigar-makers who are members of such unions, and of those manufacturers and others who employ them. It does not appear that either the plaintiff or any one of said unions is a business corporation, association, or partnership for the purpose of, or engaged in, the manufacture or sale of cigars. We gather from the complaint that any one joining any of said local unions thereby acquires the right to use the device, and

that his right continues so long as he remains a member of such union, and ceases when he ceases to be such member; that a manufacturer employing others acquires the right to use it only by employing members of some such union, and loses the right to use it when he ceases to employ such members. There may, then, be on one day one hundred thousand (if there be so many members of such unions) who have a right to use the symbol, and the next day not one thousand (if the membership of the unions shall have fallen so low), and of those whose right to use it has ceased, perhaps not one has changed his business, either as to its place, or the kind or quality of cigars made by him. And it may be that no two entitled to put the symbol on the cigars made by them are in any way connected in business. They may be rivals in business; the knowledge and skill of one pitted against the knowledge and skill of the other, and the interests of one adverse to the interests of the other. The right to use it does not seem dependent on the fact that the individual either makes or sells cigars for himself. He may place it on boxes of cigars in which he has no interest whatever. The right to use it does not seem to be transferable with the business in which it may have been used. When placed on a box of cigars, the symbol does not indicate the kind or quality, nor by whom made. Any one seeing it on a box of cigars (however familiar he may be with the use of it) could not tell who of the many thousands of individuals authorized to use it had made, or caused to be made, the cigars in the box. All that he could learn from it is, that the cigars were made by some one of the many thousand entitled to use the symbol. In other words, the symbol indicates only that the person using it is one of the many thousand members of the cigarmakers' union.

The right in trade-marks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property. Hence the law affords a remedy to the owner against one who violates the right. A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article: *Hostetter v. Fries*, 17 Fed. Rep. 620. The theory on which the right to it as property is based is, that a man may have acquired a reputation for excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this

reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected; as he ought to be, and is, in the advantages of the good-will of a business established by him; and so that the purchasing public may know the origin of such articles when offered for sale, and that they are of his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others upon similar articles, which, by such adoption and by use in connection with his articles, comes to be known as representing that the articles on which they are placed are made or prepared by him, just as his signature to a business paper is an assurance to others that he executed it. It has, indeed, been likened to his business autograph. The wrong for which a remedy is given consists in misrepresenting to the public, by the use of his trade-mark, goods, or wares of another as having been made by the true owner of the mark, and thereby depriving him to a greater or less extent of the benefit of the good-will of his establishment, and the reputation that he has given the articles made by him: *Stokes v. Landgraff*, 17 Barb. 608.

It is essential that the symbol or device shall be adopted to distinguish the productions of the manufacturer or vendor from those of others, and it must so distinguish them. "The trade-mark must, either by itself or by association, point distinctly to the origin or ownership of the article to which it is applied": *Canal Co. v. Clark*, 13 Wall. 311, 323. It must indicate, to those familiar with its use and purpose, by or for whom the article was made, produced, or prepared for sale. If such be not its purpose and meaning, it fails of being a legal trade-mark. The right to it cannot exist as a mere abstract right, independent of or disconnected from the business in which it is used. It is not property except as an incident to such business. It cannot be transferred except with the business: *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 57 Barb. 526; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Lockwood v. Bostwick*, 2 Daly, 521; *Derringer v. Plate*, 29 Cal. 292; 87 Am. Dec. 170; *McVeagh v. Valencia Cigar Factory*, American Trade-mark Cases, 970. In this particular it resembles the good-will of a business. One having acquired the right to a trade-mark in the business of manufacturing or preparing a particular article for sale may sell the trade-mark with the business, but not separate from it.

Apply the foregoing definition and essentials of a legal

trade-mark to the facts of this case, and it is apparent that the device in question cannot be a trade-mark, and the right to use, as such right is shown by the complaint, is not property, but a mere personal privilege; or rather, the use of it on cigars is only an advertisement of the fact that the person using it is a member of one of the cigar-makers' unions. Clearly, to indicate what person, firm, or corporation made the cigars in any box on which the mark is placed is not the purpose of its adoption and use. Its purpose is only to indicate membership in the union. The complaint claims for the international and local unions the right to the trade-mark, and the right to confer the privilege of using it on those they admit to membership; but it does not appear that they were ever, as unions, engaged in manufacture or trade, or that they were formed for any such purpose. The case comes just to this: The cigar-makers have formed themselves into associations, and to secure to the members whatever benefit in their business the fact of membership may give them, they agree on a certain device to be placed on their productions as a sign of membership. We might suppose any other association of persons, a church, the order of Freemasons or Odd Fellows, to agree that its several members shall put a particular device on articles manufactured by them for sale, so that the members may mutually assist each other by means of such device. Now, the right to use such a device being got merely by joining the association, and not depending at all on the person having earned a reputation or good-will for the manufacture of the particular article, it could not be regarded as a lawful trade-mark. Such a case would not materially differ from this. It is true, the members of the unions are all engaged in the same kind of business, to wit, the making of cigars. But they are not engaged in business together. The business and business interests of one are as distinct from those of another as though they followed entirely different kinds of business. In these particulars the device is wanting in the essential characteristics of a legal trade-mark: 1. It is not adopted nor used to indicate by what person the articles were made, but merely to indicate membership of a certain association. 2. Its use is not enjoyed as an incident to any business, and the right to use it cannot be transferred, even with the transfer of the business in which it may have been employed; the right to use it can be acquired only by becoming a member of one of the unions or employing those who are members, and lost only

by ceasing to be a member or to employ members. 3. There is no exclusiveness in the use, or right to use, which is necessary to a legal trade-mark: Browne on Trade-marks, secs. 143, 309, 324. Any one of many thousands of persons, no way connected in business, and perhaps unknown to each other, has an equal right to its use.

Order reversed.

TRADE-MARKS — WHAT CONSTITUTES A TRADE-MARK: See extended note to *Partridge v. Menck*, 47 Am. Dec. 284 et seq. Three things are essential to the acquisition of a title to a trade-mark: 1. The person desiring to acquire title must adopt some mark not in use to distinguish goods of the same class or kind already on the market; 2. He must apply his mark to some article of traffic; 3. He must put his article, marked with his mark, upon the market: *Schneider v. Williams*, 44 N. J. Eq. 391; compare recent case, *Allen v. McCarthy*, 37 Minn. 349, in which four judges were equally divided as to whether plaintiffs were, under the allegations of their complaint, shown to be "entitled to assert a proprietary claim or interest in the alleged device or trade-mark employed and used upon the boxes of cigars made by the Cigar-makers' Protective Union."

STATE EX REL. RAILROAD AND WAREHOUSE COMMISSION v. CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILWAY COMPANY.

[40 MINNESOTA, 267.]

TRANSPORTATION BY COMMON CARRIER IS "COMMERCE" WITHIN MEANING OF FEDERAL CONSTITUTION. — The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as used in the provision of the constitution of the United States empowering Congress to regulate commerce with foreign nations and among the several states.

RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA HAS NO AUTHORITY TO PRESCRIBE RATES for transportation by common carriers in another state, and cannot fix rates for transportation between two points within Minnesota over a route extending across a neighboring state. The power to do this is vested exclusively in Congress.

MANDAMUS. The opinion states the case.

Moses E. Clapp, attorney-general, for the relator.

James H. Howe, for the respondent.

DICKINSON, J. This is a proceeding by *mandamus* to compel this respondent to comply with an order of the railroad and warehouse commission of this state, prescribing rates for the transportation of freight over the respondent's line of road

from the city of Duluth to the city of Mankato, both of which are within this state. The only question now presented for decision is as to the jurisdiction of our railroad and warehouse commission to make this order, in view of the circumstances to which we now refer. The line of railroad operated by the respondent, and over which its business of transportation between the cities above named is carried on, is as follows: That part of the line within the city of Duluth, and which extends to the boundary line between Minnesota and Wisconsin, is owned by the Superior Short-line Railway Company of Minnesota, a corporation of this state. Connecting with this at the boundary line, and extending into the village of Superior, in Wisconsin, is a road owned by the Superior Short-line Railway Company, incorporated under the laws of the latter state; connecting with this at the village of Superior commences the railroad of this respondent, which runs from thence to the city of Hudson, in Wisconsin, a distance of 148 miles. At that point it crosses the boundary line into Minnesota, and from that point, by way of St. Paul, the line runs within this state 105 miles to Mankato, and beyond. The two short-line railways above mentioned are operated by this respondent as a part of its line of road, and we attach no importance to the fact that they are owned by other corporations. So far as it concerns the question here involved, the entire line from Duluth to Mankato is to be deemed as under the control of this respondent, and as though the whole were a part of its own line of road.

By section 8 of article 1 of the constitution of the United States, Congress is empowered "to regulate commerce with foreign nations and among the several states." The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as here used: *Gibbons v. Ogden*, 9 Wheat. 1; *Case of State Freight Tax*, 15 Wall. 232; *Lord v. Steamship Co.*, 102 U. S. 541; *Wabash etc. R'y Co. v. Illinois*, 118 Id. 557; *Philadelphia Steamship Co. v. Pennsylvania*, 122 Id. 326; *Fargo v. Michigan*, 121 Id. 230; *Carton v. Illinois Central R. R. Co.*, 59 Iowa, 148. Since the decision in *Wabash etc. R'y Co. v. Illinois*, 118 U. S. 557, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates, of such transportation as is to be deemed interstate, as distinguished from wholly domestic carriage, is exclusively given to Congress. The only question

upon which there can be any doubt is, whether the transportation to which this order of the commission relates is to be deemed commerce or transportation between different states, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our state laws, and over which Congress has no control. The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato, a large part of which—indeed the greater part of which—lies beyond the boundaries of our state, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of 148 miles through the state of Wisconsin. The order is as applicable to that part of the line as to that which is within our own state, and can only be sustained upon the theory that the railroad and warehouse commission of the state of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the state of Wisconsin, provided only that the carrier receives the property within this state, and is to carry it through the foreign state to a destination within our own borders.

In view of the above decisions of the supreme court of the United States, that the transportation of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of "commerce," to which the constitution applies, it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same state, if the transportation is through a foreign state. Assuming that the constitution places within the exclusive control of Congress the subject of transportation among the several states, let us suppose that a shipment is made from Duluth to Winona—both cities being within our state, but upon the borders of Wisconsin—by a route wholly within the latter state, excepting the inconsiderable distance of the depot-grounds in those cities from the state line. Can it be said that this carriage of perhaps two hundred miles through the state of Wisconsin, and of a mile or two within our own borders, is domestic transportation and commerce, as distinguished from that which, under the constitution, is to be deemed as being "among the several states"? The constitu-

tion, as interpreted by the court whose decisions upon this subject are final, has placed under the exclusive regulation of Congress the subject of transportation among the states, so far, among other things, as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating state legislation: See authorities above cited. Is not a case such as we have supposed, or the case now before us, transportation among the states, within this purpose of the constitution, as really as would be a shipment and transportation of goods from New York, Chicago, or Milwaukee to Minnesota, as to which unquestionably, under the decisions above cited, Congress, and not the several states, would have the power to regulate? We are unable to state any principle which supports the relator's claim of jurisdiction to determine what charges may be made for the transportation of freight through the state of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to so much of the route as is within our own state, we do not decide. The mere fact that Duluth and Mankato are both in this state, and that a part of the line of road of this respondent is also here, and operated under our law, cannot authorize our state authorities to regulate the operations of the 148 miles of road which is wholly within the state of Wisconsin, and which there exists, and is managed, of course, under the laws of that state, subject to such limitations as the national constitution may impose. The order in question applies to all freight transported over this route from Duluth to Mankato. But it appears that in the usual course of business the respondent receives freight at the docks in Duluth destined for the several points on its road, both in Wisconsin and in this state, which had been received there from vessels navigating the great lakes, and which, as is to be inferred, must be classed as interstate commerce in any meaning of that term. Of course, as to such transportation our commission has not authority to prescribe rates under the decisions above cited.

There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this state, but whose route incidentally at some point, and for an inconsiderable distance, should cross the line of the state. Whether or not the transportation in such a case might be deemed to be substantially domestic, and not embracing an important element of foreign transit, we do not

decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the state of Wisconsin.

The question under consideration has not come before the supreme court of the United States in the form here presented; but it seems to us that that court has so determined the construction and effect of the commerce clause in the constitution, that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of Congress is exclusive as respects the regulation of rates for interstate commerce.

In *Lord v. Steamship Co.*, 102 U. S. 541, the question presented for decision was, whether Congress had the power to regulate the liability (to the owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same state (California), the voyage between such ports being in part upon the high seas, and out of the limits of the state. The court recognized the fact that Congress had no power to thus interfere with the exclusively internal commerce of a state, and that the law of Congress (restricting the common-law liability of carriers) could be sustained in its application to this case only in case the transportation in question should be deemed to be within the clause of the constitution empowering Congress "to regulate commerce with foreign nations and among the several states." It was decided that such transportation was included in "commerce with foreign nations,"—a matter of "external concern," as respected the state of California,—and subject to the regulating power of Congress. If such transportation from San Francisco to San Diego, in the same state, was "foreign" commerce (transportation) within the meaning of the constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, by a route which for the most part is wholly within the territory of Wisconsin, commerce (transportation) "among the several states"? Has not the state of Wisconsin, at least, as much interest and as large a jurisdiction concerning the transit of goods by carrier

across its territory as have the nations of the world, including our own, in the voyage merely from port to port in the state of California? How can the one be deemed foreign, and the other exclusively internal, as respects the state of Minnesota? We are unable to make any distinction; and it seems to us that our decision must be controlled by that above cited. *Pacific Coast Steamship Co. v. Board of Railroad Comm'rs*, 9 Saw. 253, was like that last cited, except that the question related to the power of the state authorities of California to regulate rates of transportation upon steam-vessels between various ports in that state. That authority was denied for the reason that it was not domestic commerce, the vessels in the course of the voyage going out to sea more than a league from land. Field, J., wrote the opinion of the circuit court.

A case closely analogous to that under consideration was very recently decided by the supreme court of South Carolina, in *Sternberger v. Cape Fear etc. R. R. Co.*, 29 S. C. 510. The defendant was charged with violating the statute of that state which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum,—both places being within that state. The course of transit from Charleston was, first, over two railroads wholly within the state; then to a point in North Carolina over a road operated in both states; then for some distance within North Carolina over a road wholly within that state; then it was received in North Carolina by the defendant road, which was operated in both states, and transported to its destination at Tatum. The charge exacted for the entire distance was \$4.40, while the freight to a point six miles farther would have been only four dollars. It was held that the railroad commission of South Carolina had no jurisdiction to fix rates for such transportation; nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact, as we think, should not have affected the result.

The interstate commerce commission has recently (November, 1888) ruled upon the question here presented, holding that commerce between points in the same state, but which, in being carried from one place to the other, passes through another state, is interstate commerce, subject to congressional regulation: *New Orleans Cotton Exchange v. Cincinnati etc. R'y Co.*, 2 Interstate Com. Rep. 375. We are aware that the supreme court of Pennsylvania has held to the contrary: *Com-*

monwealth v. New York etc. R. R. Co., 2 Interstate Com. Rep. 227; *Commonwealth v. Lehigh Valley R. R. Co.*, 2 Id. 226. If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in *Lord v. Steamship Co.*, 102 U. S. 541, as having the effect which we think must be accorded to it.

Our conclusion is, that the commission had no jurisdiction to prescribe rates for transportation through the state of Wisconsin, and the writ must be quashed.

Ordered accordingly.

THE WORDS "TRADE" AND "COMMERCE" are not synonymous; the latter relates to dealings with foreign nations, the former to dealings between members of the same community: *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258.

TOWNSHEND v. GOODFELLOW.

[40 MINNESOTA, 312.]

CONTRACT FOR SALE OF LAND TO PARTNERSHIP IN FIRM NAME IS ENFORCEABLE in equity, and the deed will be decreed to be executed to the individual partners as tenants in common.

CONTRACT FOR SALE OF LAND ENFORCEABLE THOUGH VENDOR HAD NO TITLE WHEN HE MADE IT. — Where a party has no interest in the lands which he agrees to convey, but volunteers to enter into a contract as a mere venture or speculation, he is not a *bona fide* contractor, and a court of equity will not aid him in enforcing it. But one who has acquired an equitable title or interest in the lands, under an executory contract, may make a contract to sell the same to a third party without waiting to obtain his deed; and if the sale is made in good faith, and the title be fully perfected before the time of completing the purchase, it will be sufficient.

SPECIFIC PERFORMANCE NOT DECREED WHERE TITLE IS NOT MARKETABLE. — Equity will not compel the specific performance of a contract for the purchase of land, if the title thereto is so uncertain as to affect its market value. The court will not compel the purchaser to accept such a title, nor cast upon him the risk of litigation and the embarrassment of a questionable title.

SPECIFIC performance. The opinion states the case.

Jelley and Hay, for the appellant.

Julius E. Miner, for the respondents.

VANDEBURGH, J. This action is brought to enforce the specific performance of a contract for the sale and conveyance of real estate. The defendants, it appears, were partners doing business under the firm name of R. S. Goodfellow & Co.

The contract was made between plaintiff as vendor, and the defendants as vendees, under the name of R. S. Goodfellow & Co. It is not questioned that the contract was executed by the consent and authority of both defendants, who appear and answer in this action.

1. The contract was not invalid because so executed. It is enforceable in equity, and the deed will in such cases be decreed to be executed to the individual partners as tenants in common, or to the one specially named, who will, as between the partners, take the title as trustee: *Beaman v. Whitney*, 20 Me. 413, 420; *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212; *Gille v. Hunt*, 35 Minn. 357, 361; *Kellogg v. Olson*, 34 Id. 103.

2. At the date of the contract, October 11, 1887, the plaintiff had not acquired title to the land, but was a subpurchaser, holding a contract for the sale and conveyance thereof, dated October 7, 1887, executed by one Cora T. Mesick, who was the vendee in an executory contract for the sale of the same land, executed by the executors of John Copley, deceased, under and in pursuance of a power in the will of the latter, which contract was dated April 9, 1887. The testator, John Copley, died seised of the land so contracted to be conveyed. The contract in question here contains this stipulation: "If the title to said premises is not good, and cannot be made good within sixty days from date hereof, this agreement shall be void. But if the title to said premises is now good, or is made good in my name within sixty days, and said purchaser refuses to accept the same, said one dollar shall be forfeited. But said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract." Within sixty days from the date of the contract the executors of Copley, at the request of Cora Mesick, and in fulfillment of her contract with plaintiff, executed and delivered to plaintiff, in due form, a deed with warranty and full covenants of the premises, purporting to convey the same to him; and thereupon the plaintiff, on the tenth day of December, 1887, duly executed and tendered his deed of the premises to defendants in fulfillment of the contract, but they refused to receive the same, or to fulfill on their part. The defendants contend that the court ought not to enforce the contract in favor of the plaintiff vendor, because it appears that at the time the contract was made he had no title to the premises, and that equity will not actively interfere to aid a party who makes a contract to sell lands of which he is not the owner.

The rule as insisted on by the defendants is only applicable where a party has no interest in the lands which he agrees to convey, but volunteers to enter into a contract as a mere venture. Such a transaction will not be sanctioned by a court of equity, because it is a mere speculation, and one who speculates upon that of which he has no control, or the means of acquiring it, is not a *bona fide* contractor. But the general rule is, that where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation. Imperfections in the title when the contract is made will form no ground of objection thereto, if removed before the time of completing the purchase: 1 Chitty on Contracts, 11th ed., 431; Willard's Eq. Jur. 290; *Dutch Church v. Mott*, 7 Paige, 77; *Jenkins v. Fahey*, 73 N. Y. 355; *Langford v. Pitt*, 2 P. Wms. 629; *Dresel v. Jordan*, 104 Mass. 407, 416; *Moss v. Hanson*, 17 Pa. St. 379. And one who has an equitable estate merely under an executory agreement may offer the premises for sale without waiting until he has obtained a deed: *Tiernan v. Roland*, 15 Id. 429.

But it is further suggested that in this case plaintiff was at the time a mere subpurchaser, having himself no contract with the executors, and both contracts remained wholly executory. Not being a party to the first contract, he is not bound by its terms, and could not compel the parties thereto to fulfill the same as between themselves, nor would the fact that they neglected to do so give him a right of action by virtue thereof: *McCarthy v. Couch*, 37 Minn. 124. But he necessarily purchased the equitable title of the first vendee subject to that contract, although, as between him and the latter, he did not assume its obligations; and having purchased the entire interest of the first vendee, equity will interfere to protect his interest and enforce a deed to him from the vendor holding the legal title, upon a proper showing and tender of performance of the conditions subject to which it is so held, if the application is seasonably made.

When a contract is made for the sale of an estate in land, the purchaser is treated in equity as the owner, and as trustee of the purchase-money for the vendor, and the latter is considered the trustee of the legal title for the purchaser. He is not, however, completely or unconditionally so until the money is paid. Unless otherwise agreed, he holds both the posses-

sion and title until the money is paid or other conditions of the contract are fulfilled. So that a subpurchaser who has bought the equitable interest, although treated as equitable owner, takes his equitable title not only subject to the conditions of his own contract, but also to those of the first contract, and, if the latter are not complied with by his vendor, he can only enforce a deed by showing or tendering performance, and thereupon seek an adjustment of the equities between the parties, who must all be joined. The rule is stated in *McCreight v. Foster*, L. R. 5 Ch. 604, 612, as follows: "The duty imposed on those who wish to intervene in such cases is to take their own steps, to file their own bill, and to claim the benefit of the contract in such a way that the court may have the opportunity of dealing with the matter according to the rights of the parties interested in it, and may determine their position accordingly": Bispham's Eq., sec. 365. So that it may be stated generally that, subject to the conditions suggested, if specific performance will be decreed between the immediate parties to an agreement for the sale of lands, it will also be decreed between the parties claiming under them as purchasers of the legal or equitable title; that is to say, against the grantee of the vendor, and in favor of the subpurchaser, unless other controlling equities are interposed: 2 Story's Eq. Jur., sec. 789; Taylor's Eq. Jur., sec. 592; *Hays v. Hall*, 4 Port. 374, 385; *Allison v. Shilling*, 27 Tex. 450; 86 Am. Dec. 622.

The plaintiff had sufficient interest in the subject-matter to entitle him to make his contract with defendant, and if made *bona fide*, and the title was seasonably perfected so as to enable him to comply with the terms of the agreement, the action should not be defeated solely on account of the state of the title when the contract was made. Besides, by the terms of the contract, which was evidently entered into in view of the fact that the deed had not yet been obtained, it was sufficient that "the title should be made good in his name within sixty days."

3. This brings us to the consideration of the last and most material question in the case, and that is, whether upon the record it appears that the plaintiff is shown to have acquired a good and marketable title to the land in controversy. Ordinarily, a more satisfactory determination of a question of this kind can be had upon the evidence after a full hearing, and we think it would have been the better way in this case. But

the parties have rested the question upon the admission of certain facts appearing upon the face of the pleadings, which it is claimed are decisive of the question, and it was accordingly determined by the trial court upon defendant's motion for judgment upon the pleadings. The purchaser is entitled to a marketable title,—one clearly shown to be good. It must therefore be free from reasonable doubt. If it rest entirely upon record evidence, and the muniments of title are preserved and accessible, it will be a question for the court to determine upon their inspection,—a question of legal construction. If it is to be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in ordering specific performance. Thus a title depending upon the bar of the statute of limitations may be a marketable title, provided that it clearly appear that the entry of the real owner is barred: *Pratt v. Eby*, 67 Pa. St. 396. But where the title depends upon matter of fact, such as is not capable of satisfactory proof, or where the fact is capable of that proof, yet is not so proved, the purchaser cannot be compelled to take it: *Shriver v. Shriver*, 86 N. Y. 575, 585. It is not necessary that the title be shown to be bad, nor is it enough, even, that the court may on the whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation; for if there be a doubt it cannot be thrown upon the purchaser to contest that doubt: *Rede v. Oakes*, 4 De Gex, J. & S. 505. As expressed by the vice-chancellor of New Jersey in *Vreeland v. Blauvelt*, 23 N. J. Eq. 483: "A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt can be justified." It is not enough that it be a doubt "beginning in suspicion and ending in suspicion."

We are asked to reverse the decision of the trial court holding the plaintiff's title doubtful and unmarketable. Upon this matter the record discloses the following facts: One John Copley died testate, and seised of the land in controversy, December 16, 1884. By his will he bequeathed and devised all his estate, real and personal, as follows: An undivided one half of all his property, real and personal, to Michael Copley; an undivided one fourth of all his property, real and personal, to Mary Donohue; an undivided one fourth to the lawful chil-

dren of William Copley, the same to be held by them until they become of lawful age. The will further directs that trustees for the children of William Copley, deceased, be appointed, which, however, has never been done. Michael Copley and Jeremiah Donohue, named as executors, were duly appointed and qualified as such March 12, 1885. The will also contained a provision authorizing the executors to sell real estate of the testator, as follows: "And they may sell or mortgage any of my real estate at any time it may become necessary to do so, to pay any expenses or bequests herein provided for, or for the purpose of saving or improving any other portion of my said property while the same is undistributed." This power was vested in the executors under the will, and the intervention or consent of the probate court was not necessary to its exercise by them. It is not an absolute or unconditional power to sell. It can only be exercised for the purposes expressly named. If the conditions existed calling for the exercise of the power, then undoubtedly the executors might exercise a reasonable discretion as to the mode and circumstances of its exercise, though they would be required to act with good faith and reasonable prudence in the fulfillment of the trust: *Griffen v. Ford*, 1 Bosw. 123, 150. But whether or not the conditions named exist under which they may exercise the power must be a question of fact, and not of discretion. No estate in the lands was granted to the executors, in trust or otherwise, but a naked power of sale only. They have no general power to convert real into personal property, and hence, if the necessity for making any sale arose, they would not be authorized to sell property of an amount and value grossly in excess of that necessary to be sold to realize the sum needed: 2 Perry on Trusts, sec. 784; *Minot v. Prescott*, 14 Mass. 496; *Jackson v. Anderson*, 4 Wend. 474; *Roseboom v. Mosher*, 2 Denio, 61; *Griswold v. Perry*, 7 Lans. 98, 103; *Rendlesham v. Meux*, 14 Sim. 249, 257.

Counsel for plaintiff concedes that the conditions named must in fact have existed in order to authorize a sale by the executors, but he claims that this appears from the evidence spread upon the record, which the plaintiff alleges to be true, being an extract from the verified report of the executors, filed in the probate court, September 30, 1887, in which it is stated (the items being set forth) that there is a balance to be provided for, and required to meet estimated expenses and charges, and for the redemption of land, to the amount of

\$904.93. Whether this account was ever allowed or approved does not appear. But it seems that, long prior to the date of this report,—that is to say, on the ninth day of April, 1887,—the executors had entered into a written contract for the sale of the land in question to Mesick at the price of six thousand dollars, and on the seventh day of October, 1887, Mesick contracted to sell the same land to the plaintiff at the price of seven thousand six hundred dollars, and on October 11th, following, the plaintiff entered into the contract in question to sell the premises for twenty-one thousand eight hundred dollars. The contract with Mesick remained wholly executory till December 2, 1887, when, at her request, the executors conveyed directly to the plaintiff, and the plaintiff thereupon executed to them a purchase-money mortgage for five thousand dollars, and to Mesick a mortgage for five hundred dollars. Under these circumstances, the court was clearly right in holding the title unmarketable. It cannot be said that there is no question or doubt about the title tendered by the plaintiff, and the marketable value of the land will naturally be affected by the doubt and uncertainty resting upon the title. It certainly is not entirely clear that the executors were warranted in making the executory contract of sale to Mesick when they did, or in executing the deed as they did, or in selling for the price they did, or in selling so large a tract. The devisees, including infant heirs, are not parties, and would not be bound by the judgment of the court in this case. A purchaser might, we think, well hesitate to accept such a title, and a court of equity will not compel its acceptance, and cast upon him the risk of litigation and the embarrassment of a questionable title.

Order affirmed.

PARTNERSHIP — DEEDS. — Partnership style, A B & Co., is not a good name of purchase in a conveyance of realty sufficient to pass the legal title to all the members of the firm: *Winter v. Stock*, 29 Cal. 407; 89 Am. Dec. 57; but compare *Moreau v. Saffarans*, 3 Sneed, 595; 67 Am. Dec. 582; note to *McCormick's Appeal*, 98 Id. 197-201. A deed to a partnership by its firm name is not void: *Kelley v. Bourne*, 15 Or. 476.

SPECIFIC PERFORMANCE — DEFECTIVE TITLE TO REALTY. — Though a court may have a favorable opinion of a title, yet if it be satisfied that such title may be questioned by reasonable and competent persons, specific performance will not be decreed: *Turner v. McDonald*, 76 Cal. 177; 9 Am. St. Rep. 189; and a perfect title must be one that is good and valid beyond all reasonable doubt, free from litigation, palpable defects, and grave doubts; it should consist of both the legal and equitable title, and be deducible of record: *Id.*

Compare *Heavner v. Morgan*, 30 W. Va. 335; 8 Am. St. Rep. 55. The possible existence of unrecorded deeds is not such a defect in title as will cause a denial of the right to specific performance: *Dow v. Whitney*, 147 Mass. 1. The burden of proof rests upon plaintiff, in an action for specific performance, to show that he can convey to defendant a "good and merchantable" title: *Hull v. Glover*, 126 Ill. 122.

SPECIFIC PERFORMANCE rests in the sound and reasonable discretion of the court: *Knob v. Spratt*, 23 Fla. 64; *Mansfield v. Sherman*, 81 Me. 365.

NICHOLS v. CITY OF DULUTH.

[40 MINNESOTA, 389.]

CITY IS LIABLE FOR REMOVING LATERAL SUPPORT OF LAND IN GRADING ITS STREETS. It has no greater rights or powers over the soil of a street than a private owner has over his land; and if it desires greater powers than are possessed by private owners, it must acquire them by the exercise of the right of eminent domain.

ACTION to recover cost of a retaining wall. The opinion states the case.

T. L. Smith, for the appellant.

White, Shannon, and Reynolds, for the respondents.

MITCHELL, J. These actions were brought to recover the cost of a retaining wall built by the several respondents to support the soil of their respective lots so as to prevent it from falling into the adjoining street. The evidence abundantly supports the verdict of the jury, that the construction of the wall was rendered necessary by reason of the appellant city excavating the street (in grading it) so as to remove the lateral support which it naturally rendered to the soil of the adjacent property of respondent. On these facts the doctrine of *O'Brien v. City of St. Paul*, 25 Minn. 331, 38 Am. Rep. 470, and *Dyer v. City of St. Paul*, 27 Minn. 457, is decisive of the present cases. Every person has a right *ex jure naturæ* to the lateral support of the adjoining soil, and is entitled to damages for its removal. A municipal corporation has no greater rights or powers in that regard over the soil of the streets than a private owner has over his own land, and will be liable in damages for removing this lateral support the same as would a private owner if improving his property for his own use. It is no defense that the excavation was necessary for the purpose of grading the street. If the city desires greater rights than those possessed by private owners, it must acquire them

by the exercise of eminent domain. It must either do this, or else itself substitute other lateral support in place of the soil which it removes. This liability of the city in these cases does not depend, as appellant assumes, upon its negligence in making the excavation. This right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence.

Orders affirmed.

MUNICIPAL CORPORATIONS. — As to the liability of cities for injury to private property by reason of grading the streets or making improvements thereon, see *Davis v. Crawfordsville*, 119 Ind. 1; ante, p. 361, and note.

SECOND NATIONAL BANK OF ST. PAUL v. HOWE.

[40 MINNESOTA, 890.]

ACCOMMODATION NOTE HAS NO VALIDITY UNTIL IT IS DISCOUNTED or passes into the hands of a holder for value, and until it is negotiated the maker can withdraw from and rescind his engagement upon it.

NOTICE TO MANAGING OFFICER OF BANK ACTIVELY ENGAGED IN ITS DAILY BUSINESS, given during banking hours at its place of business, is notice to the bank.

LIABILITY OF BANK FOR FRAUDULENT REPRESENTATIONS OF ITS MANAGING OFFICER. — Where the maker of an accommodation note duly notifies a bank that he rescinds the engagement evidenced by the note, and the managing officer of the bank thereupon makes false and fraudulent statements respecting the solvency and financial standing of the payee, which are of a character calculated to, and which actually do, mislead the maker and induce him to withdraw his previous rescission of the contract, and consent to the negotiation of the note, the bank will be responsible for the consequences, if it subsequently receives the note from the payee. And it is not material that, at the time such statements were made, the bank was not interested in or connected with the note.

BANK IS NOT BOUND BY ACTS OR STATEMENTS OF ONE WHO IS DIRECTOR ONLY, but has no part in its management nor voice in the direction of its affairs.

ACTION on a promissory note signed by the defendants, payable to the order of one McLain, and by him indorsed. The defense was, that the defendants were accommodation makers merely, and the false representations of the plaintiff's vice-president. The trial court directed a verdict for the plaintiff. Other facts are stated in the opinion.

Warner and Lawrence, for the appellants.

C. D. and Thomas D. O'Brien, for the respondent.

COLLINS, J. The plaintiff in this action is a corporation engaged in the banking business in the city of St. Paul, while the defendants are dealing in dry-goods at the same place. The testimony which we are required to consider tends to establish that the note upon which the action is brought was given the evening before its date, as accommodation paper, to one McLain, to be discounted by him at the plaintiff bank the next day; that it was signed in the firm name by William Howe, one of the defendants, without the knowledge or consent of James Howe, his partner; that, upon being informed of the transaction, James promptly objected to the use of the firm name for McLain's benefit, and, at the opening of the bank next morning, was upon hand to notify its officers that the firm rescinded the engagement evidenced by the note. To the vice-president of the corporation, who was one of its managing officers, Howe stated that his firm was not indebted to McLain; that the note was given for accommodation solely; that the firm did not want it to go into the bank; that the firm would not be responsible for McLain's debt; and other matters of like import. It is quite clear, from the language used by Howe, that it amounted to notice that his firm revoked the act, but it nowhere appears that the bank was notified that the use of the firm name by one of the partners was repudiated by the other because it was unauthorized, and not within the scope of the partnership business, or otherwise. The testimony also indicates that the officer to whom this language was addressed assumed to know McLain's financial standing, assuring Howe that he need not be afraid of him, and that he was rich and responsible. Whereupon, and solely upon the strength of these assurances, Howe modified his rescission and revocation by authorizing the bank to take the paper if the vice-president knew McLain to be responsible. He left the bank with an injunction upon one of its managers not to take the note unless he knew its payee to be good, and immediately thereafter the note was presented by that person and discounted by the bank. Because of the position taken by the court at this point in the trial, no more witnesses were called by the defendants, but they offered to show that at the time of the conversation McLain was insolvent and in a failing condition, all of which was well known by the officer with whom the conversation was had, and that the defendants were wholly ignorant of the facts in regard to his pecuniary condition. Upon objection being made to this by the plaintiff, the objec-

tion was sustained, and a verdict ordered against defendants; the court holding that the testimony already in and that which was tendered did not constitute a defense. In this we are of the opinion that the learned court erred, and that a new trial must be had.

This was accommodation paper, and had no validity until it was discounted or had passed into the hands of a holder for value. As between the makers and McLain, it was not binding, nor did it become an obligation of the defendants until negotiated: *Tufts v. Shepherd*, 49 Me. 312; *Macy v. Kendall*, 33 Mo. 164; *Smith v. Wyckoff*, 3 Sand. Ch. 77. And until negotiated, the defendants could withdraw from and rescind their engagement upon it: 1 Daniel on Negotiable Instruments, sec. 191; *Downs v. Richardson*, 5 Barn. & Ald. 674; *Whitworth v. Adams*, 5 Rand. 333, 342; 2 Am. & Eng. Ency. of Law, 365, and cases cited. The accommodation contract being revocable, and notice of the maker's withdrawal and rescission having been given to an officer of the bank before its presentation, the inquiry is as to the effect of this notice and the legal bearing which the alleged statements and misrepresentations of the officer may have upon the situation.

This corporation must necessarily act through its representative officers,—those to whom is intrusted the conduct of its business affairs. It is immaterial what the official position may be, if the person is actively engaged in the management of its interests. It appears from the testimony that the officer with whom Howe had the conversation was one of the prominent managers of the plaintiff bank, and actively engaged in its daily business. It must follow that his knowledge of McLain's insolvent and failing condition must be imputed to, and was that of, the bank, and that notice to him in regard to a business matter pertaining to the institution was adequate notice to it. It is impossible to distinguish or discriminate between the information which he possesses or the acts which he performs as an officer and as an individual, in any matters relating to the business he is controlling. The bank had notice, according to the testimony, of the nature before stated. If, then, the officer referred to made false and fraudulent assertions respecting McLain's solvency and financial standing to Mr. Howe which were of a character calculated to, and which actually did, mislead and induce him to withdraw his previous revocation and rescission of the accommodation contract and consent to its negotiation, the plaintiff bank cannot

escape the consequences, and the issues presented by the testimony should have been passed upon by the jury.

It is not material, as seems to have been thought by the trial court, that the plaintiff should have been interested in or connected with the note at the time of the conversation. As the defendants' right to withdraw was absolute up to the moment the paper was negotiated and had passed into the hands of a third party for value, notice of revocation and rescission served upon that party is all that can be required. This notice was given, but was ineffectual, for the reasons before mentioned.

We think we have already indicated that the court was right in sustaining the objection made to the testimony relating to Mr. Berkey's knowledge of McLain's embarrassed circumstances, and what he said about it. Mr. B. was a director only in the bank. It is not shown that he had any part in the management or a voice in the direction of its affairs. He did not speak for or represent it any more than any other stockholder, and in this respect he is unlike the officer alluded to, with whom Howe communicated.

Order reversed.

ACCOMMODATION NOTE—TRANSFER AFTER MATURITY. — The maker of an accommodation note lent without restriction is liable thereon to a third party who purchases it for value after maturity: *First Nat. Bank v. Grant*, 71 Me. 374; 36 Am. Rep. 334, and note 335, 336. The maker of an accommodation note is still liable thereon, although the payee become insolvent, and having promised to surrender the note to the maker, did not do so, but transferred it before maturity to an innocent indorsee as collateral security for an antecedent debt: *Hart v. United States Trust Co.*, 118 Pa. St. 565; and to the same effect materially is *Meeker v. Shanks*, 112 Ind. 207. And, generally, it may be said that notes drawn, indorsed, or accepted for accommodation are subject to the general rule that one taking an overdue negotiable note takes it subject to all equities: *Bacon v. Harris*, 15 R. I. 599.

BANKS AND BANKING. — Notice to an agent of a bank intrusted with the management of its business is notice to the bank: *City Nat. Bank v. Martin*, 70 Tex. 643; 8 Am. St. Rep. 632, and note.

BANKS AND BANKING. — What acts of officers are binding upon the bank, and what false and fraudulent representations of an officer will not bind the bank: See note to *City Nat. Bank v. Martin*, 8 Am. St. Rep. 636.

LANG v. MOREY.

[40 MINNESOTA, 303.]

VALID MORTGAGE MAY BE GIVEN BY ONE WHO HAS MADE ENTRY UNDER HOMESTEAD LAWS of the United States, upon the land so entered, before he has made his final proof and received the certificate thereof.

ACTION to cancel mortgage. The opinion states the case.

E. A. Campbell and J. E. Waters, for the appellant.

Stringer and Seymour, for the respondent.

COLLINS, J. The tract of land involved herein was entered at the proper land-office on the 18th of March, 1878, by one James Lang, under the provisions of the homestead law of 1862: R. S. U. S., secs. 2290 et seq. Upon the thirteenth day of December, 1881, Lang executed and delivered to the defendant herein, for a valuable consideration, a mortgage upon said premises, containing the usual covenants. October 14, 1883, he made final proof, receiving a certificate thereof, and upon June 15, 1884, a patent for said tract of land was issued to Lang by the general government. Later, but prior to the commencement of this action, the object of which is to cancel and set aside said mortgage, Lang conveyed the premises by warranty deed to the plaintiff. To state the case, and to call attention to three decisions of this court, — *Townsend v. Fenton*, 30 Minn. 528, *Red River etc. R'y Co. v. Sture*, 32 Id. 95, and *Lewis v. Wetherell*, 36 Id. 386, 1 Am. St. Rep. 674, — seems about all that is necessary. In the first of these cases, it was held that an agreement made after the entry, but before final proof, to convey lands held under the homestead act when the patent should be issued, is valid. In the second, it was decided that the entry by the homesteader is a contract of purchase; that thereupon he has an inchoate title to the land, which is property, a vested right, which can only be defeated by his failure to perform the conditions affixed; that if these are performed, he becomes invested with full ownership, and an absolute right to a patent, which, when issued, relates back to the time of the entry; while in the last, it was determined that section 2296, Revised Statutes of the United States, which prescribes "that no lands acquired under the provisions" of the homestead act "shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," upon which plaintiff seems to rest her case, was manifestly intended for the protection of the

entryman, to prevent the appropriation of the land *in invitum* to the satisfaction of debts incurred anterior to the issuance of the patent, and that a mortgage given upon a government homestead, so called, after a final certificate has been issued, but before the reception of the patent, is efficacious. As the section depended upon, above quoted, applies to proceedings against an unwilling party only, and there is no provision of the law expressly prohibiting the act which plaintiff seeks to avoid, we are unable, in view of the effect attributed to the making and filing of the affidavit of entry in *Townsend v. Fenton*, *supra*, to distinguish between mortgages executed prior and those executed subsequent to final proof and delivery of the final certificate: See *Spieess v. Neuberg*, 71 Wis. 279; 5 Am. St. Rep. 211; *Orr v. Stewart*, 67 Cal. 275. The court below was right in its conclusion of law upon the admitted facts, and in refusing a new trial.

Order affirmed.

A VALID MORTGAGE OF LAND ENTERED AS A HOMESTEAD under the United States laws may be made by the claimant after he has received his final certificate, and before patent therefor has been issued to him: *Lewis v. Wetherell*, 36 Minn. 386; 1 Am. St. Rep. 674, and note 675; compare *Spieess v. Neuberg*, 71 Wis. 279; 5 Am. St. Rep. 211. But a contract by a settler upon public land, made before his pre-emption of it, to convey to another an interest in the land in consideration for money loaned and advanced him to pre-empt it, is in violation of section 2262, Revised Statutes of the United States, and void: *Marshall v. Cowles*, 48 Ark. 362.

BOARDMAN v. WARD.

[40 MINNESOTA, 399.]

RECOVERY FOR VOLUNTARY SERVICES, PERFORMANCE OF WHICH IS INDUCED BY FRAUD. — Where a person, under a mistake of fact, is induced by the fraud and concealment of another to perform for him valuable services, the law raises an obligation to pay what the services are reasonably worth, and *assumpsit* lies to recover the same, although when rendered there was no expectation that they should be paid for.

ACTION to recover for services. The opinion states the case

J. C. McClure, for the appellant.

S. J. Nelson, for the respondent.

VANDEBURGH, J. The plaintiff sues to recover the value of her services alleged by her to have been rendered for de-

defendant from the sixteenth day of July, 1885, to the twenty-seventh day of August, 1887. Defendant, in his answer, alleges that the plaintiff, at her own request, resided with him during the time referred to, and that the services were voluntarily rendered by her in assisting his wife in the household work, and that she received board, clothing, and care as a member of his family, which were an equivalent for such services. The case was tried before a referee, and comes here upon appeal from a judgment in plaintiff's favor rendered upon the report of the referee. The record presents the findings of the referee, and but a single exception, which was taken to his ruling in refusing to dismiss the action after the evidence on both sides had been introduced; and the decision of the case on the merits turns upon the question whether the facts found supported the judgment. It appears from the findings that the defendant was the guardian of the plaintiff, who was an orphan, and as such had charge of her estate, and that from the time she was about eight years of age, she "continued to reside at intervals with defendant until July 18, 1885," when she became of age, and in the mean time she rendered such services in his family as she was capable of, and was by him supplied with necessary and suitable board and clothing. She supposed that she was regarded as one of the family, and that her services were during all this time offset against her board and clothing, and she did not understand or suspect that she was to be charged with the latter and credited with the former in his account as guardian. After she became of age, she continued to reside with his family as before, until she left, in 1877; and it is found that during that time she worked for defendant in and about the care of his household for the full term of 107 weeks, and that her services were worth the sum of \$214, exclusive of board, and that she received from him during that time certain sums of money and articles of clothing to the amount and value of \$64.51. It is found, on the other hand, that the plaintiff did not in fact regard her as a member of his family, but as an employee and boarder, charging her in his account as guardian with the board and clothing furnished, and crediting her with her services, before and until she became of age, and "that chiefly by reason of the charges by him made as aforesaid in his account, the moneys by him received as such guardian were exhausted, and he did not have, or claimed not to have, anything whatever belonging to her after the termination of

his guardianship." He did not render any account of his guardianship till April 4, 1888, when it was filed, and it appears therefrom that the estate was fully exhausted. Up to that time he had not informed her that he had kept any such account of the amount of his expenditures for her, and of the value of her services, and until about the time she left his service, "she understood and believed that the moneys which defendant held in trust for her as her guardian remained intact and undiminished by any charges for her support and maintenance, and that she would receive the same whenever she left his household," all of which he well knew; and that he not only concealed from her the true state of the case, and his purpose to make any such charges, but so conducted himself as to encourage and strengthen such understanding and expectation. So that, in short, as she claims, relying upon his good faith as her guardian, she was kept in ignorance of their true relations, and was induced to remain and render the services in question through his deceit and her own mistake; and upon discovering the fact that he had in reality been dealing with her as a servant, and had charged her with her support to the amount of her estate, she repudiated the relation as she had previously understood it, and now seeks to charge him in the relation in which he has elected to treat her as her guardian. We think this claim supported by the record. He will not now be permitted to change his ground, and take advantage of her ignorance and his fraud to treat her as a member of his family, so as to defeat her claim for services. Under such circumstances, the law will raise an obligation to pay what the services are reasonably worth, and *assumpsit* will lie to recover the same: Wood on Master and Servant, 2d ed., sec. 68; *Rickard v. Stanton*, 16 Wend. 25; and see 1 Pomeroy's Eq. Jur., sec. 182. There can be no objection, therefore, to the form of action, or to the complaint, since the law will, in such case, imply a promise on the part of the person who has received the benefit of the services: Bliss on Code Pleading, sec. 128.

Judgment affirmed.

ASSUMPSIT — RIGHT TO RECOVER FOR SERVICES. — If services are rendered at the request of a party, he is liable therefor, though the services were rendered in expectation of a legacy: *Martin v. Wright*, 13 Wend. 460; 28 Am. Dec. 468; *Roberts v. Swift*, 1 Yeates, 209; 1 Am. Dec. 295. But where a party performs work for another without his privity or request, however beneficial such labor may be, he cannot recover therefor: *Barthol-*

omew v. Jackson, 20 Johns. 28; 11 Am. Dec. 237. And where services are rendered as an act of kindness, they cannot afterward form the foundation of a pecuniary demand or contract: *Jacobs v. Ursuline Nuns*, 2 Mart. (La.) 269; 5 Am. Dec. 730; *James v. O'Driscoll*, 2 Bay, 101; 1 Am. Dec. 632. No recovery can be had by way of *assumpsit* for services rendered gratuitously for another: *Stadd v. Stadd*, 40 Kan. 646.

WELTER v. CITY OF ST. PAUL.

[40 MINNESOTA, 400.]

LIABILITY OF CITY FOR NEGLIGENCE OF ITS OFFICERS IN PERFORMING CORPORATE DUTIES. — A municipal corporation is liable for injuries to its employees or others, resulting from the negligence of its authorized agents in making improvements, which it has general authority under its charter to make, and which are authorized by it.

ACTION for personal injuries. The opinion states the case.

W. P. Murray, for the appellant.

James E. Markham, for the respondent.

VANDEBURGH, J. This case comes here upon appeal from an order overruling the defendant's demurrer to the complaint. The complaint shows that the plaintiff was employed as a laborer by the defendant in working on the streets. The city had caused an excavation, or trench, to be made in one of the streets for a sewer or drain, and carelessly neglected to brace or protect the sides of the same to prevent the earth from caving in, so that it was a dangerous place to work in. The plaintiff was subject to the orders of the defendant's agent or foreman in charge of the work, and by his direction went to work in the sewer, and, without notice of its dangerous condition, was injured by the caving in of earth and stones upon him. The complaint states a cause of action. The city has the care and control of the streets, and is charged with the duty and has general authority to make improvements therein, and to construct sewers and drains. These are corporate powers and duties, and it is liable for its negligence, or the negligence of its officers, in the exercise of such powers and the performance of such duties. It is true that, under the charter of the city, improvements, where the costs exceed two hundred dollars, are to be made under contract with the lowest bidder, but it does not appear that this work was not such as the city itself might undertake in strict conformity with the charter, or that it was not a mere local drain for a street

improvement; and even if its proceedings were not regular in this respect, yet, being a municipal improvement which it might within its general authority cause to be made, and which as it is alleged was in this instance in fact made by it, it will be held liable for injuries resulting to its servants or others resulting from the negligence of its authorized agents in executing the work. In other words, it cannot be permitted to set up the plea of *ultra vires*, if the work was authorized by it, and was within the scope of its corporate power or authority to act in reference to it under any circumstances: 2 Dillon on Municipal Corporations, sec. 968.

Order affirmed.

MUNICIPAL CORPORATIONS are not liable for a failure to exercise legislative or judicial powers, nor for a negligent exercise of such powers, but only where it negligently performs or fails to perform ministerial duties imposed by law: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note. A city is responsible for its agent's acts in grading its streets: *Rich v. City of Minneapolis*, 37 Minn. 423; 5 Am. St. Rep. 861. So a city is liable for injuries sustained by reason of a failure to keep its streets in a safe condition, where by its charter it has the power to improve, light, lay out, and keep its streets in good repair: *Clark v. City of Richmond*, 83 Va. 355; 5 Am. St. Rep. 281, and note 284.

MUNICIPAL CORPORATIONS — FOR WHAT NEGLIGENCE A CITY MAY BE LIABLE — RECENT CASES. — *With Respect to Sidewalks, Streets, and Highways.* — A city is not an insurer of the safety of pedestrians upon its sidewalks, but is liable when injuries are sustained by reason of negligence on the city's part, without any contributory negligence of the person injured: *Lindsay v. City of Des Moines*, 74 Iowa, 112; *City of Richmond v. Mulholland*, 116 Ind. 173; and the duty of a city is merely to keep its sidewalks reasonably clean and safe: *Kaveny v. City of Troy*, 108 N. Y. 571. To perform the duties imposed upon it by statute, the law presumes that a city has actual control of its sidewalks; so that in an action for an injury by reason of a defective sidewalk, plaintiff need not show that defendant had built the sidewalk, or had assumed control thereof: *Shannon v. Tama City*, 74 Iowa, 22. But the acts of a property owner who improves his sidewalk under an ordinance of the city are not the acts of the city, so as to charge it with negligence; but if the city was negligent in addition to the negligence of the property owner, or if the ordinance directed work to be done on sidewalks which was inherently dangerous, the city will be liable: *Dooley v. Town of Sullivan*, 112 Ind. 451. A city is not liable for negligence of persons whom it permits to use its streets and sidewalks, unless the city has notice of such negligence, or the things authorized to be done by the licensees is inherently dangerous: *City of Warsaw v. Dunlap*, 112 Id. 576. The law will allow a reasonable time in which a city can get notice of its defective streets, and also reasonable time to repair them: *Stanton v. City of Salem*, 145 Mass. 476. But cities must exercise always a reasonable supervision and control of their streets; so that often notice of defective streets will be imputed to cities because of the great length of time during which the defects have existed: *Davis v. Guilford*, 55 Conn. 351. A failure, after notice, on the part of a city to repair defective streets would

cause the city to be liable in damages to one injured thereby; for the law imposes upon a city the duty of faithfully performing the duties defined in its charter, and gives a cause of action to any one sustaining injury by neglect of such city to perform such duties: *Klein v. City of Dallas*, 71 Tex. 280; *Galveston v. Poznansky*, 62 Id. 118. Evidence that a sidewalk "tipped" was material to show that it was defective, especially when the injury occurred when such alleged defective sidewalk was covered with ice: *Haskell v. City of Des Moines*, 74 Iowa, 110. So the fact that a similar accident had happened to another person by reason of the same alleged defect in a sidewalk is admissible to show a city's negligence in respect to such sidewalk: *Gilmer v. City of Atlanta*, 77 Ga. 688.

With Respect to Sewers. — A municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work: *City of Terre Haute v. Hudnut*, 112 Ind. 542. Where, however, reasonable care is exercised in securing fair skill and care in making and planning a sewer, and ordinary care and skill is used in seeing that such skill is exercised, there is no negligence, and consequently no liability, on the part of the municipality, even though when such plan of sewerage is carried into effect, a defect may develop which destroys or impairs its efficacy, thereby damaging private individuals: *Mayor of Jersey City v. Kiernan*, 50 N. J. L. 246; *City of Terre Haute v. Hudnut*, 112 Ind. 542. A municipality is liable for damages occasioned by the accumulation of water in large quantities on the premises of individuals, caused by negligence in constructing defective sewers: *City of Eufaula v. Simmons*, 86 Ala. 515.

With Respect to Bridges. — A city is liable for personal injuries occasioned by reason of the negligence of its agents in constructing a bridge, which it was directed by statute to rebuild according to certain approved plans and specifications: *Doherty v. Inhabitants of Braintree*, 148 Mass. 495.

MUNICIPAL CORPORATIONS — NEGLIGENCE OF AGENTS. — Policemen employed to enforce the police regulations of a city are not agents of the city in its corporate capacity, so that the city will not be liable for their acts or their negligence: *Peters v. City of Linsborg*, 40 Kan. 654. Where a board of commissioners acting as agents for a city by statutory authority are guilty of negligence, the city will be liable for damages resulting from such negligence: *Johns v. Cincinnati*, 45 Ohio St. 278. And a city may even be liable for the acts of one merely assuming to act in its behalf, provided this is done with the knowledge of the city officers: *Beers v. Dalles City*, 16 Or. 334.

WILSON v. HAYES.

[40 MINNESOTA, 581.]

ASSIGNMENTS TO BE PRODUCED ON REDEMPTION FROM FORECLOSURE, WHAT ARE NOT. — Where a mortgagee transfers the note, without assigning the mortgage securing it, and afterwards buys back the note, the equitable transfers of the beneficial interest in the mortgage effected by the transfer and repurchase of the debt are not "assignments" within the meaning of General Statutes 1878, chapter 81, section 14, which the mortgagee is required to produce to the person or officer from whom he offers to redeem.

JUNIOR REDEMPTIONERS ONLY CAN TAKE ADVANTAGE OF NON-COMPLIANCE WITH PROVISIONS of the statute, Laws 1881, extra session, chapter 3,

requiring a redemptioner to file in the office of the register of deeds, within twenty-four hours after his tender and demand, the documents produced to the sheriff from whom the redemption is made.

BURDEN OF PROOF OF ALTERATION OF INSTRUMENT. — The burden of proof is upon the maker of an instrument to show that an alteration thereof was made after delivery. The proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act, and this will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and the question when, by whom, and with what intent the alteration was made, is one of fact, to be submitted to the jury upon the whole evidence, intrinsic and extrinsic. This rule applies to negotiable promissory notes as well as to other instruments.

FRAUDULENT ALTERATION OF INSTRUMENT BY HOLDER INCAPABLE OF RATIFICATION. — Where the holder of a promissory note makes a fraudulent alteration in it, amounting in law to a forgery, which destroys the instrument and extinguishes the debt, the maker's subsequent assent to such alteration, given without any new consideration, does not create any liability upon the altered instrument in favor of the holder.

ACTION to enforce a right to redeem. The opinion states the case.

Noyes and McGee, for the appellant.

Ueland, Shores, and Holt, and Levi E. Lum, for the respondents.

MITCHELL, J. On August 27, 1885, plaintiff loaned to defendant Douglas five thousand dollars, for which the latter executed his promissory note, secured by a mortgage on certain real estate upon which he had executed a prior mortgage to the Minneapolis Loan and Trust Company. It had been previously agreed between plaintiff and Douglas that plaintiff was "to take an assignment" of the prior mortgage, and that Douglas should have three years in which to redeem the property. In September, 1885, Wilson indorsed and sold Douglas's note to the Bank of Minneapolis, but made no formal assignment of the mortgage. Wilson not having obtained any assignment of the Loan and Trust Company's mortgage, and default having been made in its conditions, the company foreclosed and bid in the property on the 23d of July, 1887, and subsequently transferred the certificate of sale to defendant Hayes, who was a judgment creditor of Douglas, junior to both mortgages. Shortly before the expiration of the time of redemption, Wilson applied to Hayes for an assignment of the certificate of sale, which the latter refused to give. Thereupon Wilson repurchased Douglas's note from the Bank of Minneapolis, filed his intention to redeem as mortgagee, and on July 25,

1888, presented to the sheriff who made the sale his mortgage and the affidavit required by statute, and tendered the proper amount of money, and demanded a certificate of redemption. The sheriff, at the instance and direction of Douglas and Hayes, refused to accept the money or allow plaintiff to redeem. Hayes now claims to own the property under the foreclosure of the trust company mortgage. Plaintiff brings this action to enforce his right of redemption.

Defendants first deny Wilson's right to redeem, on the ground of his alleged failure to comply with the requirements of statute. They urge that, inasmuch as the statute requires a redemptioner to produce to the sheriff "any assignments necessary to establish his claim," and as a transfer of the debt operates as an equitable assignment of the mortgage security, therefore Wilson ought to have presented to the sheriff whatever evidenced the transfer by him to the bank, and the re-transfer by it to him. There is nothing in this point. The object of the statute is to require the production to the sheriff of assignments constituting the redemptioner's chain of title, and necessary to show his ownership of the mortgage or other lien under which he claims the right to redeem. In the present case the mortgage stood in Wilson's name all the time; and while the transfer of the note carried with it equitably all beneficial interest in the mortgage, yet upon Wilson's taking up the note from the bank he was placed *in statu quo*, and again became the equitable as well as the legal holder of the mortgage. It would be absurd to require him to produce assignments which in fact never existed.

It is also claimed that Wilson lost his right to redeem because he did not, within twenty-four hours after his tender and demand, cause the documents produced to the sheriff to be filed in the office of the register of deeds, as provided by General Statutes 1878, chapter 81, section 14; Laws 1881, extra session, chapter 3. Without stopping to consider what will be the effect of a failure to comply with this statute, it seems to us that it may at least admit of doubt whether it is applicable to a case like the present, where upon tender and demand a redemption is not permitted. But, at any rate, as it is intended for the benefit and protection of junior redemptioners, they alone, if any one, can take advantage of a non-compliance with its provisions.

Plaintiff's right to redeem is also denied because he never obtained an assignment of the trust company's mortgage, as

he had agreed with Douglas to do. Conceding that he was guilty of a breach of contract in not doing so, we fail to see how that is any cause for refusing him the right to redeem in order to protect his own mortgage. Hayes certainly has no right, either as assignee of the trust company or as judgment creditor of Douglas, to set up any such thing. He was no party to this contract, nor was it made for his benefit; and whatever other remedy Douglas might have, he cannot assert any such thing against plaintiff's right to redeem. In the first place, his own right of redemption, and consequently all his interest in the property, was gone. In the next place, he could not be benefited, but would in fact be damaged, by preventing plaintiff from redeeming, for his debt to plaintiff would still exist to its full amount; whereas, if a redemption were had, the debt would be satisfied to the extent of the value of the property over the amount paid to redeem. And if plaintiff had redeemed, equity would still treat him as trustee for Douglas to the extent necessary to protect his rights under the contract. Therefore a redemption, so far from being in conflict with plaintiff's obligations to Douglas, would have been in the line of their performance.

The last and principal defense is, that Wilson fraudulently altered the note secured by the mortgage, after its execution, by erasing the word "annually," and inserting the word "quarterly," so as to make the interest payable quarterly, instead of yearly, thereby destroying the instrument and extinguishing the debt. Plaintiff interposed a reply putting in issue the alteration, and further alleging (as we may fairly construe it, in the absence of any specific objection to the pleading) that Douglas had ratified the note in its present condition by paying interest on it, with full knowledge of all the facts. Upon this issue as to the alteration of the note the court submitted certain questions to the jury, their answers to which were, in substance, that the note was altered after its execution, without the knowledge or consent of Douglas, by some one to the jury unknown, but by and with the knowledge and authority of Wilson. Without considering whether the evidence warranted these findings, it is enough to say that it was such that the jury might have found the other way. The erasure and interlineation constituting the alleged alteration are apparent upon the face of the instrument upon inspection, and are in a different colored ink from the remainder of the written portion of the note.

The court, at the request of defendants, and against plaintiff's objection, instructed the jury that, in the absence of any evidence as to when the alteration was made, it would be their duty to find that it was made after delivery; that such was the presumption of law, in the absence of explanation; and that the burden of proof was upon plaintiff, as holder, to show that it was made before execution. This instruction, in various forms, was repeated and emphasized, and is here assigned as error. The question of presumption and burden of proof, where interlineations or erasures appear on the face of an instrument, is one upon which there is a wilderness of authorities and much conflict of opinion. Any attempt to cite or consider the innumerable cases on this question would be both impracticable and useless.

The rule adopted by some authorities is, that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required in the first instance; while others hold, in accordance with the instruction of the trial court in this case, that the presumption of law is, that the alteration was made after delivery, and therefore the burden is upon the holder to explain it, and show that it was made under circumstances that would not invalidate the instrument. In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to wit, that the alteration raises a presumption against the instrument when it is suspicious; otherwise, not. But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And if held suspicious, when must it be explained,—before or after it is admitted in evidence? Evidence as to when, by whom, and with what intent, an alteration was made may be one or both of two kinds,—extrinsic or intrinsic; the latter being that furnished by the inspection of the instrument itself, such as its appearance, the nature of the alteration, etc. These things, considered in connection with the relation of the parties to the instrument, may often constitute important evidence. And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the altera-

tion was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case.

The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. Moreover, all disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts; the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts. Now, it is a matter of common knowledge that at the present day every man is, to a certain extent, his own lawyer, and that laymen frequently draw their own contracts, without much regard to form, in which erasures and interlineations are the rule rather than the exception. Indeed, the same thing is unfortunately true of many instruments which come from the hands of lawyers. It is also a matter of common knowledge that printed blanks are now in general use for almost all kinds of contracts, and that it is the common practice, even with many lawyers, in case the blank does not conform to the actual agreement of the parties, to erase and interline, without making any notation that this was done before execution. Whatever might have been the fact formerly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners, with great care, and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day. The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be, that it was a legitimate part of the instrument, and was made at or

before its execution. We are therefore of opinion that the correct rule is, that the burden is upon the maker to show that the alteration was made after delivery; or perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act, and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom, and with what intent, the alteration was made is one of fact, to be submitted to the jury upon the whole evidence, intrinsic and extrinsic.

Many authorities, however, while admitting that the general rule is that the law presumes that an alteration in an instrument is a legitimate part of it until the contrary appears, hold that this rule does not extend to negotiable securities. Most of the text-books seem to lay this down as the law, but at the same time admit that the opposite view has the sanction of eminent judicial authority. The reasons usually assigned for applying to negotiable paper a rule different from that applied to other instruments are, substantially and briefly, two: 1. As notes and bills are intended for negotiation, and as payees would not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands until it is repelled. 2. That, without such a presumption to sustain him, the maker would be defenseless, as he cannot be expected to account for what happened after the paper left his hands. The first of these reasons, it seems to us, rather begs the question; and whatever force it might have possessed in times when the use of so-called negotiable instruments was confined to strictly commercial paper, it can have but little weight now, when such instruments are taken and given by all classes of people, in the most informal manner, as mere evidences of indebtedness, and without reference to their subsequent negotiation. Most of what we have suggested on this point is equally applicable to promissory notes. The second reason might have had much force when parties were not competent witnesses, but very little now, when they may testify in their own behalf. No one can better know than the maker what condition an instrument was in when it left his hands. We can see no good reason in principle why any distinction in this regard should be made between negotiable paper and other instruments, and the ten-

dency of many of the late American authorities is to repudiate any such distinction: *Bailey v. Taylor*, 11 Conn. 531; 29 Am. Dec. 321; *Hunt v. Gray*, 85 N. J. L. 227; *Gooch v. Bryant*, 13 Me. 386; *Crabtree v. Clark*, 20 Id. 337; *Neil v. Case*, 25 Kan. 510; 37 Am. Rep. 259. See also *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775; *Davis v. Jenney*, 1 Met. 221.

Our conclusion therefore is, that the instruction of the court below was erroneous, and for that reason the order refusing a new trial must be reversed.

With reference to a new trial, it becomes proper to consider the effect of Douglas's so-called ratification of the alleged alteration. The court found that upon the discovery of it he denounced the alteration as fraudulent and unauthorized, and did not acquiesce therein. This is not justified by the evidence. While it appears that, upon being shown the note by the bank, — then the holder, — he asserted that it had been altered since he delivered it, yet, so far from repudiating it, according to his own admissions, he repeatedly paid interest on it, voluntarily, and without objection. If the alteration was capable of ratification, this would, according to all the authorities, amount to a ratification or adoption, whichever it may be called. If the alteration was a mere spoliation by a third party, or if made by the holder by mistake or accident, or innocently, and without fraudulent intent, so that it did not destroy the note, or at least did not extinguish the debt of which it was the evidence, it would not invalidate or effect the mortgage, which can only be discharged by the payment or extinction of the debt secured by it. In such case the question of ratification would be wholly immaterial. But suppose the alteration was fraudulently made, amounting in law to a forgery, the question remains, Could this be subsequently ratified by Douglas, so as to make the note in its altered form his contract?

The question whether a forgery is capable of being ratified, so as to create a liability on the forged instrument, in the absence of circumstances constituting an estoppel *in pais*, is one upon which there is almost as much conflict of authorities as upon that of burden of proof and presumption, already considered. Some of the cases, holding the negative of the question, place the doctrine upon grounds of public policy; others, upon the ground that ratification involves the relation of agency, and that ratification can only be effectual when the act is done by the agent avowedly for or on account of the

principal; that the very nature of ratification presupposes the act done for another, but without competent authority, and hence can have no application to a forgery, for a forger never acts or assumes to act for another; others put it upon the ground that, in the absence of any new consideration, the ratification or adoption of the forged instrument would be a mere *nudum pactum*.

The cases holding a forgery capable of ratification take the ground that, so far as considerations of public policy are concerned, the ratification of forgeries should stand on the same footing as that of other contracts, and should be held valid, unless made in consideration of compounding the felony, or for some other illegal consideration; that as to the want of authority, it can make no difference whether the unauthorized act was or was not a forgery; that this want of authority is the very thing which the ratification cures, and to which the maxim applies, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*; that the ratification is "dragged back and made equivalent to a prior command"; that a ratification is not a contract, but an adoption of one previously made in the name of the ratifying party, and requires no consideration: See *Brook v. Hook*, L. R. 6 Ex. 89, 98; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; 5 Am. Rep. 445; *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Dec. 702; *Owsley v. Philips*, 78 Ky. 517; 39 Am. Rep. 258; *Ferry v. Taylor*, 33 Mo. 323, 334; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Forsyth v. Day*, 46 Me. 176.

In the large majority of the cases usually cited in support of the proposition that a forgery can be ratified, it will be found that the question was presented in connection with circumstances creating an estoppel; or that there was in fact no fraudulent making or altering, but merely a lack of sufficient authority; and hence such cases are not in point. Where the ratification is made to a third party,—the holder of the instrument, who was not a party to the forgery,—we are not called upon to decide whether or not such ratification would create a valid liability on the instrument. All the authorities cited by appellant to the effect that a forgery may be ratified are of this class. But we have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally

impossible in such a case that the relation of principal and agent could exist between the parties; for one man cannot be the agent of another to make a contract with himself. Hence it would seem that the doctrine of ratification can have no application to such a case. If the entire instrument was a forgery, in the popular sense, it would require no argument to prove that a mere assent to or ratification of it in the hands of the forger would be a mere *nudum pactum*. But in law there is no distinction between a forgery in making and a forgery by altering. The altered instrument is not the contract of the maker, and in legal contemplation is as entirely a forgery as the other. If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done he may assent to afterwards, so as to bind himself, if there be a consideration to support it. But where there has been a fraudulent alteration of a written contract which not only destroys the instrument, but extinguishes the debt, it seems to us clear, on principle, that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any view of the case, a mere naked promise: *McHugh v. County of Schuylkill*, *Workman v. Wright*, *Owsley v. Philips*, *supra*.

Order reversed.

ALTERATION OF INSTRUMENTS. — The question as to when an alteration was made in an instrument is for the jury: *Neil v. Case*, 25 Kan. 510; 37 Am. Rep. 259, and note 260–264, as to what is the province of the jury with respect to questions concerning alterations in instruments, and the burden of proof in such cases; *Bailey v. Taylor*, 11 Conn. 531; 29 Am. Dec. 321, and note; *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775, and note 782. The burden of proof is upon him who alleges an alteration in a writing after its execution, but it shifts from him to the adversary, if the writing, when produced, appears to have been altered in a substantially material manner: *Harris v. Bank of Jacksonville*, 22 Fla. 501; 1 Am. St. Rep. 201. The burden of proof is upon the holder of a negotiable instrument to show that an alteration therein was innocently made: *Crowell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238, and note 239.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BRUEN v. GILLET.

[115 NEW YORK, 10.]

A TRUSTEE IS NOT RESPONSIBLE FOR THE ACTS OF HIS CO-TRUSTEE IF HE IS PASSIVE MERELY, and is guilty of no negligence himself; but if he receives the funds of the estate, and either delivers them over to his associate, or does any act by which the funds come into the sole possession and control of the latter, and but for which the latter would not have received them, the former trustee is liable for any loss sustained in consequence of such action.

IF FUNDS COME INTO THE JOINT POSSESSION OF TRUSTEES, . ALL ARE BOUND to see to their proper application, and are responsible for their misapplication by a common agent, even without their express consent.

CO-TRUSTEES OR ASSIGNEES, LIABILITY OF, FOR ONE ANOTHER. — Where moneys were collected by H., one of two assignees, for the benefit of creditors, and deposited in a bank to the credit of H. and his co-assignee G., but were afterwards withdrawn from such bank, and deposited with H., who was carrying on business as a private banker, and who subsequently became insolvent, it was held that G. was liable for such moneys.

LIABILITY OF TRUSTEE FOR MONEYS WHICH HE HAS AIDED IN PLACING IN THE POSSESSION OF HIS CO-TRUSTEES CANNOT BE MADE TO DEPEND on the good credit of the latter.

IF ONE OF THE TWO TRUSTEES RECEIVES MONEYS BY THE JOINT ACT OF HIMSELF AND HIS CO-TRUSTEE, and other moneys, without the act or aid of his co-trustee, the latter is answerable only for the proper application of the first-named moneys, and may be exonerated from all liability by proving that the first-named moneys were properly applied. The burden establishing such application must be assumed by him.

ACTION by Bruen against Gillet and Hall as assignees for the benefit of the creditors of H. W. Beadle. Of the moneys in controversy, \$50,000 had been collected by Hall, but had

been deposited in the bank to the credit of both assignees, whence they had been drawn on the joint check of both, and deposited in Hall's bank. Other moneys had been collected by Hall, without the aid of Gillet, who never received any part thereof. The whole amount collected was \$110,124.09. The assignees were allowed \$89,125.89 for expenses and commissions, but were charged \$11,400.65 interest on moneys misappropriated. The balance of \$32,400.27 was regarded by the referee as a charge against both assignees. The report of the referee was confirmed by the trial court and by the general term. Defendant Gillet thereupon appealed, claiming that he was not answerable for the trust funds which had been collected and received by Hall, who had had the principal charge and management of the trust estate.

Louis Marshall, for the appellant.

Roswell R. Moss, for the respondent.

PECKHAM, J. We have lately held that one executor (and I think the rule is the same with other trustees) is responsible for his own acts, and not for those of his associate; and if the latter collect and misapply the money, the executor who has not received it is not liable for the waste. If he is merely passive, and simply does not obstruct the collection by his associate, he is not liable for the latter's waste, if guilty of no negligence himself. But where one executor or trustee receives the funds of the estate, and neither delivers them over to his associate, or does any act by which the funds come under the sole possession and control of the latter, and but for which he would not have received them, the executor or trustee is liable for the loss which is sustained in consequence of such action: *Croft v. Williams*, 88 N. Y. 384; *Adair v. Brimmer*, 74 Id. 539, 564; *Monell v. Monell*, 5 Johns. Ch. 283; 9 Am. Dec. 390; *Langford v. Gascoyne*, 11 Ves. 333; *Underwood v. Stevens*, 1 Mer. 712; *Williams v. Nixon*, 2 Beav. 472.

In *Langford v. Gascoyne*, 11 Ves. 333, it was laid down by the master of the rolls that where a trustee was merely passive by not obstructing the reception of the money by his co-trustee, he is not liable, but if he contribute in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse. In that case the money of the estate had been delivered to one of the executors and he delivered it to his co-executor, who converted it, and he was held

liable for such conversion, notwithstanding it was what the master of the rolls called a very hard case.

In *Williams v. Nixon*, 2 Beav. 472, two executors sold out stock belonging to the estate, and the proceeds were received by one. It was held that the other was responsible for its misappropriation, because the stock had been in their joint possession and each was responsible for the proper application of the funds arising from the sale. The principle upon which the liability of one trustee for the act of his co-trustee, under these circumstances, arises, is, that the property, the fund, the assets of the estate having once come into the joint control or the joint possession of the trustees, it is the duty of each trustee to see to it that the fund does not go out from under his control or possession, excepting as it is applied to the fulfillment of the trust. Thus, says Lord Redesdale, in *Joy v. Campbell*, 1 Schoales & L. 341: "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving it; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay his co-executor, for it could have no other meaning; he became responsible for the application of the money just as if he had received it."

In *Adair v. Brimmer*, *supra*, Judge Rapallo treats the principle as well settled, that where the funds have come to the joint possession of the trustees all are bound to see to their proper application, and are responsible for a misapplication by a common agent, even without their express consent.

In *Croft v. Williams*, *supra*, it was stated that if an executor do any act by which the funds should come to the hands of his co-executor, and but for which he would not have received them, and he diverts or wastes them, the executor is liable for the loss. In this case there can be no question but that the funds which were deposited in the two banks to the joint credit of the assignees thereby came under their joint possession or control. No disposition could have been made of them without the active interference of Gillet, whose signature was necessary, not for the purpose of enabling his co-trustee to obtain from a third person a debt due the estate, but to enable such

trustee to obtain and deposit with himself the money already collected and in their joint possession and control. This was a proceeding in no wise necessary for the due and orderly administration of the estate.

In cases where a debt due to the trust estate by a debtor has been paid to one of two or more trustees, and the debtor has required, as a condition of such payment, that a receipt should be joined in by all the trustees, in such case the signing of a receipt by the trustees who did not personally receive the money has been held to be merely formal or necessary for the purpose of obtaining the money from the debtor, and that they who did not receive the money in fact were not bound by their written admission of its receipt for the purpose named, and were not liable for the failure of the one who did in fact receive it to properly apply it. Of this class is the case of *Paulling v. Sharkey*, 88 N. Y. 432. There the three executors were empowered to sell the real estate, and acting under such power, it was sold, and all the executors joined in the conveyance. But the price was paid by the purchaser by check, payable to the order of one of the executors, and delivered to him. He indorsed and delivered to his co-executor, who also indorsed it and received the money, and the court held that the indorsement by the executor to whose order the check was payable was a mere formal matter, necessary for the purpose of obtaining possession of the purchase-money from the purchaser, and, as matter of fact, the possession did not come into the hands of that executor to whose order the check was payable, but that it did come into the hands of that one of them who immediately drew the money upon the check after it was indorsed.

This is not such a case. The act of Gillet in signing the checks by which these moneys, then under their joint control, were drawn from the banks and transferred to the individual and separate control of Hall, was an act but for the doing of which the moneys would not have been received by Hall, and Gillet must be held responsible for any amount which was lost in consequence of such act. It is not in the least material that Hall had originally collected these moneys, and had then voluntarily deposited them to the joint credit of Gillet and himself. It is enough that Gillet had the joint control of them after such deposit, and it was his act which substituted the separate possession of Hall for such joint control, and he must take the consequences.

We do not think that the case of *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, has any application to this case. There we held that a surrogate to whom moneys had been paid, belonging to an estate, and which had been by him deposited in good faith with a private banker, in good standing and credit, doing a general banking business, pending proceedings to determine the parties entitled to such moneys, was not responsible for the failure of the banker and consequent loss of the funds before the determination of such proceedings, and while the moneys remained with him. It appeared that there was no negligence on the part of the surrogate in making the deposit, and the sureties upon his official bond were held not to be liable for the loss.

In the case at bar, the assignee is held liable for the proper application of the funds, not because he assented to their deposit with a private banker, but because, such funds being under his control and in his possession jointly with his co-assignee, he assisted in drawing them out and placing them in the individual custody of his co-assignee, and therefore within all the cases he must be held responsible for their due application. Such responsibility, we think, is none the less clear because the co-assignee happens to be a private banker. The deposit was, nevertheless, with him individually, and it still remains true that his exclusive possession of the funds was obtained by the act of his co-trustee, who before that had joint control and possession of the funds with him.

It is clear that in the *Faulkner* case, *supra*, if the surrogate had also been a private banker, he would have been liable for the loss of the funds if he had deposited them in his own private bank to his credit as surrogate or to the credit of the estate to which they belonged. There would have been no change of liability in such a case, because there would have been no change of possession, for the moneys would have been in his possession just the same after the deposit as they were before. In the case at bar, no escape from liability can be properly founded upon the mere fact that Hall was a private banker. When the money, through the active assistance of Gillet, passed from their joint control into the possession of Hall, the liability at once arose on the part of Gillet to see to it that those funds were properly applied by Hall, and that liability could not be lessened or extinguished upon any principle, simply because Hall was engaged in the business of a private banker. Nowhere in the books that I have found has

the liability of a trustee been made to depend upon the good credit of the co-trustee under such circumstances. In 3 Williams on Executors, 6th Am. ed., from 7th Eng. ed., 1930, it is stated in the text that one executor placing the property of a testator in the hands of the other, who is a banker in good credit, the executor so depositing was not to be charged in case of loss, for if he had been a sole executor he would have had, under the same circumstances, the right to place the money in the banker's hands, and he has the same right although the banker happens to be his co-executor. But the cases cited to support that proposition do not, as I think, sustain it. They are *Churchill v. Hobson*, 1 P. Wms. 241; *Chambers v. Minchin*, 7 Ves. 198, and 21 Vin. Abr. 534, tit Trust, note a, 9.

In *Churchill v. Hobson*, *supra*, the testator had made the executor, Goodwyn, his banker during his life, and had intrusted large sums of money to him, and, at his death, made him and the plaintiff Churchill executors of his estate. Churchill paid five hundred pounds of the funds of the estate to Goodwyn, who afterwards became insolvent, and Churchill commenced the action to be discharged of the executorship, and to be indemnified against the insolvency of Goodwyn. It was claimed that Churchill ought to be responsible for the five hundred pounds, because it was by his special act that Goodwyn had received it. But Lord Chancellor Harcourt held otherwise, upon the ground that Goodwyn had been chosen a confidential cashier of the testator for large sums of money in his lifetime, and that the executor ought not to suffer for trusting him after his death, who had been made by the testator one of his executors. The case was decided in 1713, and the judgment cites no authority for the proposition, and is not entitled to much weight as against other, later, and much better-considered cases. It is founded, however, upon the trust which the testator himself, in his lifetime, put in the cashier. Even then we do not think it can be reconciled with the general principle which is so well established by the later cases already referred to, and which principle establishes that one trustee should be answerable for the acts of another when he places the funds of the estate in such other's hands, or does some act but for the doing of which such trust property would not have been received by the co-trustee. What a testator, in his lifetime, may do with his own can form no proper criterion or test as to the propriety of the same action by trustees or executors

A man has the right to do what he will with his own, and may run such risks and take such chances as seem to him good. The liability of one trustee, under the circumstances herein spoken of, is wholly different, and cannot be determined by reference to the conduct of a testator in his lifetime, and I can see no reason for abrogating such liability in a case where the trustee happens to be a private banker, any more than in any case where such trustee is in good financial credit. This latter fact has never, so far as I can find, been regarded as the least reason for modifying or extinguishing the duty of a trustee, who has once obtained joint control of any property of the estate, to see to it that such property is applied in a due course of administration of the trust.

In *Chambers v. Minchin*, 7 Ves. 198, the subject is merely touched upon by the lord chancellor in passing. The question was not involved, and no decision made in regard to it. The manuscript report of the case of *Attorney-General v. Randell*, Trinity Vacation, 1734, contained in Viner's Abridgment, *supra*, is not in point. That was a case where the receipt given by the two trustees was formal only, and for the purpose of obtaining from the executors the moneys bequeathed to the trustees, and which moneys the executors would not pay to a third trustee unless the others joined in the receipt, which they did. The money was in fact received by the third trustee, and a large part of it was by him legitimately expended for the purpose of the trust, and the balance was lost by his insolvency. The court declined to hold the two trustees, who never in fact received the fund, responsible for its loss.

But although the defendant Gillet is responsible for the proper application of the funds which came into the hands of Hall by reason of Gillet's act in signing the checks, yet it by no means follows that he is to be held responsible for the full amount of Hall's deficit. It was so held by the courts below, and, as we think, erroneously. It was a less sum than fifty thousand dollars that was drawn from these banks by the act of Gillet, and placed in the separate custody of Hall, and in the course of the proper administration of the trust, Hall paid out nearly ninety thousand dollars. He may, therefore, have paid out every dollar drawn from the banks through the aid of Gillet in the proper course of administration, and in that event he ought not to have been held liable for any loss of other assets collected by Hall, and which never came into his possession or control: *Shipbrook v. Hinchinbrook*, 11 Ves. 252;

Underwood v. Stevens, 1 Mer. 712; *Williams v. Nixon*, 2 Beav. 472, 477; *Wilmerding v. McKesson*, 103 N. Y. 329.

We think the exceptions taken to the referee's report are sufficient to raise the questions here discussed. The admission of the receipt of assets in the written account presented to the referee is not conclusive here as to the amounts actually received by defendant Gillet. The proof is, and so, too, is the finding, that he collected and received nothing. At the time when the accounts were made out there was no question of separate liability, as Hall was still in first-class financial credit, and the account was evidently a mere statement of the total amount of the trust received, and of the total amount of expenses, while the question of separate receipt or disbursement, as between the assignees themselves, was never thought of.

Upon the question of interest, we think the court below proceeded upon an erroneous theory. The ground of liability of Gillet in this case rests upon a neglect to fully perform the duties of his trust, in failing to see to the proper application of the moneys intrusted to Hall through his act. But there is no allegation or proof of any affirmative wrong-doing on the part of Gillet, or of the use by him of any funds from which the slightest benefit to himself arose. Both the evidence and finding are the other way.

Under these circumstances, we think that interest at the rate of five per cent upon that portion of the fund drawn out from these banks, which the defendant Gillet may fail to show was properly applied to the purposes of the trust, would make a fair rule in making up the account: *Underwood v. Stevens*, *supra*; *Wilmerding v. McKesson*, *supra*. It may be that on the new trial, which must take place, it will be found that the defendant Gillet is not responsible for any portion of the loss occasioned by the failure of Hall. The burden is on him to show a proper application of the funds which came to Hall's hands through his act.

The judgment should be reversed and a new trial ordered, costs to abide event.

TRUSTS AND TRUSTEES. — Conduct of trustees in management and disposition of trust property must be regulated and controlled by the provisions and conditions of the deed of trust: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; *Hunt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63. A trustee in possession of the trust property is only bound to ordinary diligence in its preservation and protection: *Campbell v. Miller*, 28 Ga. 304; 95 Am. Dec. 289, and note 292.

TRUSTEES ARE LIABLE FOR EACH OTHER'S ACTS: *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250. Thus a joint trustee of a discretionary trust is liable for the misapplication of the trust fund by his co-trustee, where it is through his instrumentality that the fund has been obtained by such co-trustee, or where the wasting of the fund has been enabled by some act of his amounting to gross negligence: *Denderick v. Contrell*, 10 Yerg. 263; 31 Am. Dec. 576.

CO-TRUSTEES MUST JOINTLY EXECUTE SUCH DUTIES of their office as demand the exercise of judgment and discretion, although mere ministerial acts may be performed by one of them: *Vandever's Appeal*, 8 Watts & S. 405; 47 Am. Dec. 305.

TRUSTS AND TRUSTEES. — Trustees have no right to assume extraordinary risks, but should do business upon business principles, and not depart radically from the purposes of the trust reposed in them; for though a man may run any risks he pleases with his own property, a trustee has no right to use his trust to accommodate other parties, or to enter upon an extended course of discounting and indorsing with customers: *Loud v. Winchester*, 64 Mich. 23

CUSICK v. ADAMS.

[115 NEW YORK, 55.]

ONE CONSTRUCTING A BRIDGE FOR HIS OWN CONVENIENCES OR PURPOSES, CONNECTING HIS LAND WITH A HIGHWAY, THEREBY ASSUMES no active duty of vigilance to see that those who go upon it voluntarily, and by invitation of his, are not injured, though by his sufferance the public has made use of such bridge.

ONE GOING ON THE PREMISES OF ANOTHER WITHOUT INVITATION is a bare licensee of the latter, who passively acquiesces in his going, and cannot recover for injury sustained by reason of a mere defect in such premises.

ACTION to recover for injuries from a defect in a bridge erected by defendant. Judgment for plaintiff in the trial court was confirmed by the general term. Defendant appealed.

Nathaniel C. Moak, for the appellant.

P. D. Niver, for the respondent.

GRAY, J. The plaintiff recovered damages against the defendant for injuries resulting from a fall through a hole in a bridge which the defendant had, some years previously, constructed over the Mohawk River, to connect an island belonging to him with the city of Cohoes.

The plaintiff was crossing the bridge in order to see some shooting-match upon the island. He sustained no relations with the defendant, and it is not pretended that the defendant had anything to do with the objects which induced the

plaintiff to cross the bridge. He simply used it for his own convenience and pleasure. The right to recover was sustained at the general term of the supreme court, on the theory that the defendant, by his construction of the bridge and of the approach to it, extended the public highway to all appearances over the bridge, and thus misled the plaintiff to his damage. The proof hardly, in my opinion, warrants any such assumption. The city end of the bridge rested on a vacant piece of land, and not on the highway. But even granting that the end of the bridge connected with a highway or street, I do not think that circumstance of sufficient importance by itself to justify our departure from the well-settled rule in cases where the defendant, as the owner of the premises whereon a stranger is injured, is sought to be held in damages. It is not a question of appearances, nor of what the plaintiff supposed from the appearances, but simply whether the defendant has failed in any duty which he owed to the plaintiff, either generally, as a member of society, or particularly because of any relations subsisting between them. We have here but a question of law upon the proofs. Did the defendant, in constructing the bridge for his own convenience or purposes, thereby assume any active duty of vigilance to see that those who went upon it voluntarily, and by no invitation, express or implied, of his, but simply by his sufferance, were not injured? I do not see how by my connecting my premises with a public highway there is imposed any duty upon me to maintain and protect that connection for a public use. The duty of the individual is to use his property in such wise as not to injure his neighbor, and he may not maintain a nuisance upon his premises; but this case does not fall within the application of such rules.

The plaintiff was an utter stranger to the defendant. He was not upon the bridge by the defendant's invitation, nor upon any business of his. The evidence does not disclose any reason for his being there at all with which the defendant was connected or concerned. It does appear that the bridge was used by the public for the purpose of crossing over to the island; but it was not so used by any agreement with the defendant, or with his permission. It was merely by his sufferance that they made use of it.

The principle is now well settled by repeated adjudications, in this country and in England, that where a person comes upon the premises of another without invitation, but simply

as a bare licensee, and the owner of the property, passively, acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself. The theory of liability in negligence cases is the violation of some legal duty to exercise care. Among the numerous cases, I refer to the following only, as necessary to illustrate the general rule of liability: *Gautret v. Egerton*, L. R. 2 Com. P. 371; *Hounsell v. Smyth*, 7 Com. B., N. S., 743; *Burchell v. Hickisson*, 50 L. J., Q. B., C. P., Ex. 101; *Ivay v. Hedges*, L. R. 9 Q. B. D. 80; *Sutton v. New York etc. R. R. Co.*, 66 N. Y. 243; *Larmore v. Crown Point Co.*, 101 Id. 391; *Splittorf v. State*, 108 Id. 205; *Donahue v. State*, 112 Id. 142; *Hargreaves v. Deacon*, 25 Mich. 1; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Vanderbeck v. Hendry*, 34 N. J. L. 467.

In Whittaker's Smith on Negligence, 1st Am. ed., the cases are collected and the doctrine is discussed. The case of *Beck v. Carter*, 68 N. Y. 292, 23 Am. Rep. 175, does not help the plaintiff. In that case there was an affirmative act on the defendant's part which contributed to the occurrence. There the owner had long suffered the land to be used by the public as a part of the highway before his hotel, and while the hotel stood it was rather to his advantage to leave the strip of land open to the public. Upon this land the owner had made an excavation, which he left unprotected, and the plaintiff fell in upon a dark night. That was a different case from this, where the defendant, upon the proof, was not shown to be advantaged by any use by the public of his bridge, and where he was charged with no affirmative act. He had undoubtedly suffered the bridge to get out of repair. For what reason or what his interest in its maintenance was, we are not informed, nor are we concerned, and the knowledge is immaterial to the case. We may observe, further, that the dangerous condition of the bridge was not concealed. The holes were very apparent, and the bad condition of the bridge had existed for several years. It, therefore, cannot be said that the bridge was in any sense a trap which subjected innocent persons to injury.

In the recent case of *Ivay v. Hedges*, L. R. 9 Q. B. D. 80, the court went very far in support of the doctrine of non-liability of an owner for injuries occasioned to others while upon his premises. There, a landlord let out a house to sev-

eral tenants, each of whom had the privilege of using the roof for the purpose of drying their linen. The plaintiff, one of the tenants, while on the roof, slipped, and the rail being out of repair (and known by landlord to be so), fell through it into the court below. Lord Coleridge said that no liability rested upon defendant for not keeping the rail in repair, in the absence of an absolute contract for the use of the roof. He held that "the tenant takes the premises as he finds them."

The opinion of Lindley, L. J., in the case of *Burchell v. Hickisson*, 50 L. J., Q. B., C. P., Ex. 101, is much in point.

I think the general-term judgment proceeded upon the wrong theory, and that this case falls clearly within the doctrine laid down by the authorities I have cited. The principle upon which the cases of *Larmore v. Crown Point*, *Splittorf v. State*, and *Donahue v. State*, *supra*, were decided, is applicable here; and the opinions of judges Andrews and Ruger are instructive in their bearing upon the question of liability raised in this case. No other question in the case demands our consideration.

The judgment of the supreme court and of the Albany county court should be reversed, and a new trial had, with costs to abide the event.

OWNER OF REAL PROPERTY IS NOT LIABLE TO ANOTHER for injuries occasioned by its unsafe condition, when the person sustaining the injury was not at or near the place of danger by lawful right, and when the owner has neither expressly nor impliedly invited him there, nor allured him by attractions or inducements exhibited or held out in some way calculated to lead him into danger, without giving notice of the peril to be avoided: *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and cases collected in note 615.

GRISWOLD v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[115 NEW YORK, 61.]

EXPERT EVIDENCE — THE OPINION OF A MEDICAL WITNESS, HAVING KNOWLEDGE OF THE CASE, AS TO THE PROBABILITY OF THE PLAINTIFF'S RECOVERY, is admissible in evidence in an action for damages for personal injuries received by plaintiff from defendant's negligence.

ACTION to recover damages for personal injuries. Judgment, entered in favor of the plaintiff upon the verdict of a jury, was affirmed by the general term, as was also the order of the trial court denying defendant's motion for a new trial. Thereupon

an appeal was prosecuted from the judgment of the general term.

John H. Camp, for the appellant.

Isaac S. Signor, for the respondent.

FINCH, J. The plaintiff, after proving the injury which she had suffered from the negligence of the defendant company, was allowed to inquire of a medical witness having knowledge of the case as to the probability of her recovery. The same question, with slight and immaterial changes of form, was permitted to be answered by other competent medical witnesses, and the exceptions to this class of evidence furnish the sole ground of appeal.

The appellant relies upon *Strohm v. New York etc. R. R. Co.*, 96 N. Y. 805, and *Tozer v. New York etc. R. R. Co.*, 105 Id. 617. We said of these cases, in *Turner v. City of Newburgh*, 109 Id. 309, 4 Am. St. Rep. 453, that they "simply preclude the giving of evidence of future consequences which are contingent, speculative, and merely possible as the basis of ascertaining damages," and we added "that they in no wise conflict with the rule allowing evidence of physicians as to a plaintiff's present condition of bodily suffering or injuries, of their permanence, and as to their cause." The questions objected to in this case related to the permanence of the injuries, and sought a medical opinion as to their continuance in the future or a recovery from their effects. The inquiry was proper and competent. There is an obvious difference between an opinion as to the permanence of a disease or injury already existing, capable of being examined and studied, and one as to the merely possible outbreak of new diseases or sufferings having their cause in the original injury. In the former case, that disease or injury and its symptoms are present and existing, their indications are more or less plain and obvious, and from their severity or slowness a recovery may reasonably be expected, or the contrary; while an opinion that some new and different complication will arise is merely a double speculation,—one that it may possibly occur; and the other, that if it does, it will be a product of the original injury instead of some other new and perhaps unknown cause.

The questions objected to were not inadmissible because they sought the probabilities of a recovery. Certainty was impossible. Medicine is very far from being an exact science. At the

best, its diagnosis is little more than a guess enlightened by experience. The chances of recovery in a given case are more or less affected by unknown causes and unexpected contingencies; and the wisest physician can do no more than form an opinion, based upon a reasonable probability. It is argued that the witness must have an opinion as to the permanence of the injury, and then may express that; but necessarily the opinion must rest upon a balance of probabilities, inclining the medical judgment one way or the other; and the opinion given is none the worse because it expresses, and does not conceal, that it rests upon a reasonable probability strong enough to justify the formation of an opinion. Substantially, that was the result of the evidence given, and the objection to it was properly overruled.

'The judgment should be affirmed, with costs.

EXPERT EVIDENCE — PHYSICIANS. — The testimony of physicians as to the permanency of personal injury is not incompetent in an action for negligence causing a personal injury: *Buel v. New York etc. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271; *Matteson v. New York etc. R. R. Co.*, 35 N. Y. 487; 91 Am. Dec. 67.

EXPERTS, WHO ARE, AND IN WHAT CASES EXPERT TESTIMONY IS ADMISSIBLE: Note to *Hammond v. Woodman*, 66 Am. Dec. 228-246.

PHYSICIANS MAY TESTIFY AS EXPERTS as to the probable result and effect of an injury: *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note 450; *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865. And a physician may give expert testimony as to the nature and extent of an injury sustained, even though partially based upon statements made to him by the person injured descriptive of present pains and symptoms: *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60.

EXPERT TESTIMONY — PHYSICIANS. — A physician cannot testify as an expert in a case as to the symptoms of poisoning, where his knowledge is confined wholly to what he gained from books and medical instruction, and he has no personal experience from observation. *Soquet v. State*, 72 Wis. 659. In propounding hypothetical questions to medical experts, counsel may assume any state of facts which the evidence in any way tends to prove, because such facts are only assumed for the purposes of the question: *Peterson v. Chicago etc. R'y Co.*, 38 Minn. 511. The jury must not act upon expert testimony to the exclusion of other testimony; but the expert evidence must be considered in connection with the other evidence in the case, applying the general rules of evidence to both: *Wagner v. State*, 116 Ind. 181.

AHERN v. STEELE.

[115 NEW YORK, 202.]

TRUSTEE DEMISING PROPERTY WHILE IN SUCH CONDITION AS TO BE A NUISANCE is guilty of misfeasance, and during the continuance of his estate is answerable for any damages caused thereby, but the beneficiaries under the trust are not responsible for any nuisance created or permitted by him.

NUISANCE, WHO LIABLE FOR. — It is the OCCUPIER OF LANDS, rather than the owner thereof, who is generally answerable for any nuisance thereon. The owner, however, is responsible if he creates and maintains a nuisance; if he creates a nuisance, and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was created by the prior owner, or by a stranger, and he knowingly maintains it; if he demises the premises, and covenants to keep them in repair, and omits to repair them, and thus they become a nuisance; and if he demises premises to be used as a nuisance or for a business, or in a way so that they will necessarily become a nuisance.

CHILDREN WHO INHERIT PROPERTY SUBJECT TO AN OUTSTANDING LEASE ARE NOT RESPONSIBLE FOR A NUISANCE CREATED THEREON during the existence of the precedent estate, and without any notice thereof.

GRANTEE OR DEVISEE OF PREMISES UPON WHICH THERE IS A NUISANCE is not responsible therefor until he has notice thereof, and in some cases not until he has been required to abate the same. Notice may be inferred in some instances, as where the grantee or devisee comes into the possession of the premises, and their condition is such that their possessors must know that they constitute a dangerous nuisance.

TENANT, AND NOT LANDLORD, IS LIABLE TO THIRD PERSONS FOR ANY ACCIDENT OR INJURY OCCASIONED to them by the premises being in a dangerous condition, unless the landlord has contracted with the tenant to repair, or has let the premises in a ruinous condition, or expressly licensed the tenant to do the acts amounting to a nuisance.

NUISANCE. — THAT OWNERS OF LEASED PROPERTY HAD THE RIGHT TO GO THEREON TO MAKE REPAIRS, if they should see fit to do so, does not render them liable for a nuisance thereon by which plaintiff was injured. The rule would be otherwise if they had agreed to make all necessary repairs.

John B. Whiting and Charles A. Jackson, for the appellants.

Edward D. McCarthy, for the respondent.

EARL, J. The will of John Gardner came under consideration in *Greason v. Keteltas*, 17 N. Y. 491, and it was there held that the trustee under that will took an estate in fee determinable when the purpose of the trust should cease, and that such a trustee had power at law to lease for a term which might extend beyond the period of his trust estate. The lease executed by the trustee to Phelan for a term of five years from May 1, 1880, was, therefore, valid for the whole term, and had nearly four years to run at the time of Mrs. De Dion's death,

and more than two years at the time of the accident. Hence any reasoning based upon the postulate that the defendants could have terminated the lease before the end of the term will lead to inevitable error.

There was no proof, even if that were in any way important, that the pier was out of repair in 1817, when Gardner died. It became out of repair and defective at some time during the existence of the trust estate, and in that condition it was demised by the trustee. By demising the pier while it was in such a condition as to be a nuisance, the trustee was guilty of a misfeasance, and during the existence of his estate, notwithstanding the lease, he would have been responsible for any damage caused by the nuisance. Even if he had been the trustee of Mrs. De Dion's children, and they had been the beneficiaries under the trust; they would not have been responsible for any nuisance created or permitted by him; and so it was held in *People v. Townsend*, 3 Hill, 479. But he was not trustee for them; they derived no title or benefit from him, and had no connection whatever with him. They took their title under the will of John Gardner, and were in no way responsible for what the trustee did, or omitted to do, upon the trust estate.

We have, then, this question for our determination: Are the children of Mrs. De Dion, who became full owners of this pier at the death of their mother, subject to a valid outstanding lease, responsible for a nuisance created thereon during the existence of the precedent estate, without any notice thereof? I have carefully examined the English and American authorities, and confidently assert that there is not an authority to be found in the books imposing such responsibility.

It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and *prima facie* attaches: *Pretty v. Bickmore*, L. R. 8 Com. P. 401; *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; 74 Am. Dec. 682; *City of Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Inhabitants of Oakham v. Holbrook*, 11 Cush. 299. The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance, and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair,

and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. In all such cases, I believe, there is now no dispute that the owner would be liable. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance, unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs, he is not responsible for the nuisance during the term: *Pretty v. Bickmore*, *supra*; *Gwinnell v. Eamer*, L. R. 10 Com. P. 658; *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76. But these cases are not in entire harmony with the decisions in our own state, and probably would not now be generally received as authority in this country or in England.

A grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question. One of the earliest, if not the earliest case in which this rule was announced, is *Penruddock's Case*, 5 Coke, 100 b, where it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee, unless he does not remove the nuisance after request; and in *Pierson v. Glean*, 14 N. J. L. 37, 25 Am. Dec. 497, Chief Justice Hornblower said: "The law, as settled in *Penruddock's Case*, *supra*, has never, I believe, been seriously questioned since." In *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333, Richardson, C. J., said: "When he who erects the nuisance conveys the land, he does not transfer the liability to his grantee; for it is agreed in all the books that the grantee is not liable until upon request he refuses to remove the nuisance." In *Woodman v. Tufts*, 9 N. H. 88, it was held that where a dam was erected, and land flowed by the grantor of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damages, and request to remove the nuisance or withdraw the water. In *Eastman v. Amoskeag Mfg. Co.*, 44 Id. 144, 82 Am. Dec. 201, it was held that no notice or request to abate the nuisance is necessary before bringing suit against

the original wrong-doer in such cases for the damages done; but that the grantee of the nuisance is not liable to the party injured, until, upon request made, he refuses to remove the nuisance. Sargent, J., writing the opinion, said: "The doctrine of the cases in this state and elsewhere is, that he who erects a nuisance does not, by conveying the land to another, transfer the liability for the erection to the grantee; and the grantee is not liable, until, upon request, he refuses to remove the nuisance, for the reason that he cannot know until such request but the dam was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable notwithstanding his alienation." To the same effect is *Carleton v. Redington*, 21 N. H. 291.

In *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405, where it appeared, in an action for the obstruction of a watercourse by raising a dam, that the dam creating the obstruction was erected by the defendant's grantor, it was held that the plaintiff could not recover without proving a special request to the defendant to remove the obstruction. Sherman, J., writing the opinion, said: "The law is well settled that a purchaser of the property on which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it. This rule is very reasonable. The purchaser of property might be subject to great injustice, if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured"; and so, also, it was held in *Noyes v. Stillman*, 24 Conn. 15. In *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91, it was held that a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove it. In *Pierson v. Gleason*, *supra*, it was held that an action for continuing a nuisance cannot be maintained against him who did not erect it without a previous request to him to remove or abate it. In *Beavers v. Trimmer*, 2 N. J. L. 97, it was held that when the action is not brought against the original erector of a nuisance, but against a subsequent owner or tenant, a special request to remove it must be alleged. In *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, it was held that a tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy, if he had not been requested to remove it, or done any new act which of itself was a nuisance. And the same rule

has repeatedly been laid down in this state. In *Hubbard v. Russell*, 24 Barb. 404, an action against the continuator of a private nuisance, originally erected by another, to recover damages for the injury sustained thereby, it was held that the plaintiff must prove a notice to the defendant of its existence, and a request to remove it. In *Miller v. Church*, 2 Thomp. & C. 259, in an action to recover damages for the overflow of a mill-pond, it was shown that the defendant, the owner of the pond, was not in possession, having leased the same to a third party, and it was held that the owner of the premises overflowed could not recover for such overflow without showing that the defendant had notice or knowledge of the existence of the same before the action was brought. And the same rules, without any variation, are laid down by all the text-writers. In Chitty on Pleading, 71, it is said that every occupier is liable for the continuance of a nuisance on his own land, though erected by another, if he refuses to remove the same after notice. And in 2 Chitty on Pleading, 833, note c, the author adds, that if the action is not brought against the original erector of the nuisance, but against his feoffee, lessee, etc., it is necessary to allege a special request to the defendant to remove it. In Cooley on Torts, 611, the learned author says: "A party who comes into possession of land as grantee or lessee, with a nuisance already upon it, is not, in general, liable for the continuance of the nuisance until his attention has been called to it, and he has been requested to abate it." In 1 Hilliard on Torts, 3d ed., 574, it is said "that a person who continues a nuisance erected by another is liable therefor at the suit of any party damaged thereby, if he had knowledge of its hurtful tendency, or, more especially, if notified, or requested to remove it." In Moak's Underhill on Torts, 253-255, the learned editor, with many citations of authorities to sustain him, says: "Where premises are out of repair at the time they are leased, in particulars which the landlord is bound, as against third persons, not to allow, the landlord is liable for any injuries sustained by a third person from such want of repair. But not even in such case, if the tenant's use is what produces the injury." "A landlord who negligently or improperly constructs his premises,—as a dam,—or where they become defective, after notice suffers them to remain so, is liable to his tenant, or a stranger, who, being himself free from fault, is injured thereby." "Where a lessee or grantee continues a nuisance

of a nature not especially unlawful, he is liable to an action for it only after notice to reform or abate it." In Addison on Torts, Wood's Am. ed., sec. 240, it is said: "And so an action will lie against the landlord for a permanent nuisance, although the nuisance was created before the reversion came to him, i. e., if he knew of it, and might have determined the tenancy before the injury happened, as in the case of a tenancy from year to year." "If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action; but if the action is brought against the mere continuance of a preceding nuisance, a request to remove the nuisance must be made before the action is commenced": Sec. 280. "The occupier of lands is, in general, responsible for the continuance of a nuisance upon them; and so is the landlord, if the nuisance existed at the time he demised them, or created the tenancy after he had the power of determining it": Sec. 283.

According to these authorities, the simple fact that the three children of Mrs. De Dion became owners of the pier upon the death of their mother did not make them responsible for this nuisance then existing. Suppose this accident had happened an hour, or a day, or one week after the death of their mother, would they have been responsible, even if the pier had come to them not subject to any lease? To cast such a responsibility upon a grantee or devisee might imperil his whole fortune. Before it can be cast in such a case, he must have notice of the nuisance, and a reasonable time to abate it. There must be some fault, some *delictum*, on his part, and his liability can have no other basis. The notice required to put him in fault may be proved like any other fact. The mere fact that the owner personally occupies the premises upon which the nuisance is alleged to exist is not always sufficient to charge him with notice of its existence. It may, like a dam, or a building obstructing ancient lights, be of such a nature that he may rightfully suppose that he has the right to maintain it; or it may be of such a character that he may not know of its harmful tendency; in such cases, he must have actual notice that the structure is a nuisance; and there may be cases in which, besides notice, there must be a request to abate. But where the structure or the condition of premises is such as to be absolutely a nuisance plainly visible, so that an occupier may see and know the nuisance and its dangerous character or hurtful

tendency, then an owner in the occupation of the premises may, from his mere occupancy, be charged with notice thereof. In this case, if these defendants had gone into possession of this pier personally, or by their agents, its character was such that they must have known that it was dangerous and a nuisance, and no direct proof of notice would have been required to charge them; it could have been inferred. But when there is no proof that the owners of premises, which came to them with a nuisance existing thereon without their fault, were ever in possession of the premises, or ever even saw them, there is no possible ground for charging them with notice, or imputing to them legal fault.

But the position of these defendants is stronger than the one we have just been dealing with. This pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years which they had no power to terminate. The lessee who occupied and used the pier was under obligation to the public to see that it did not become a nuisance, and it was his duty to respond for any damage sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligations to see, by watchful vigilance, that he performed such duty. And so it has been held in all the analogous cases that the landlord, in the absence of notice, is liable only in case he demised the premises with the nuisance thereon. In *Rosewell v. Prior*, 2 Salk. 460, a tenant for years erected a nuisance, and afterwards made an under-lease, and the question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease. And it was held that it would; "for he transferred it with the original wrong, and his demise affirms the continuance of it." In *Todd v. Flight*, 9 Com. B., N. S., 377, it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them to remain so until, by reason of the want of reparation, they fall upon and injure the house of an adjoining owner.

In *Nelson v. Liverpool Brewing Co.*, L. R. 2 Com. P. D. 311, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or where he has beer

guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition, and that in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. Lopes, J., writing the opinion, said: "We think there are only two ways in which landlords or owners can be made liable in the case of injury to a stranger by the defective repairs of premises let to a tenant, the occupier, and the occupier, alone, being *prima facie* liable: 1. In the case of a contract by the landlord to do repairs when the tenant can sue him for not repairing; 2. In the case of a misfeasance by the landlord, as, for instance, where he lets the premises in a ruinous condition. In either of these cases we think an action would lie against the owner." In Woodfall's Landlord and Tenant, 13th ed., 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to the rule appear to arise when the landlord has either,— 1. Contracted with the tenant to repair; or 2. Where he has let the premises in a ruinous condition; or 3. Where he has expressly licensed the tenant to do acts amounting to a nuisance." In *Knauss v. Brua*, 107 Pa. St. 85, repeated in *Fow v Roberts*, 108 Id. 489, it is said: "We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant." In *City of Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775, Shaw, C. J., said: "By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuitry of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved." And to the same effect is *Larus v. Farren Hotel Co.*, 116 Mass. 67. In *Cunningham v. Cambridge Savings Bank*, 138 Id. 480, Morton, C. J., said: "It is often said in the cases that the occupier, and not the owner, of

a building is liable to third persons for damages arising from any defect. But by occupier is meant, not merely the person who physically occupies the building, but the person who occupies it as a tenant having the control of it, and being, as to the public, under the duty of keeping it in repair." In *Dalay v. Savage*, 145 Id. 38, 1 Am. St. Rep. 429, land abutting on a public street in a city was sold under a power contained in a mortgage, and the owner of the equity of redemption released any title he might have to the purchaser, and was allowed by the purchaser to remain in possession under an agreement that he should pay rent at a certain rate monthly. At the time of the sale there was an open and visible defect in the cover of a coal-hole in the sidewalk in front of a house on the land, which hole led to the cellar of the house. In consequence of this defect, during the tenancy, a person walking on the sidewalk fell into the hole, and it was held that he could maintain an action against the purchaser of the land for the injury thereby sustained. Field, J., writing the opinion, said: "It seems to be settled that if the landlord lets premises abutting upon a way which was from their condition or construction dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered therefrom, although the premises are occupied by a tenant. . . . The reason of the rule that if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injury suffered therefrom, is, that by letting he has authorized the continuance of the nuisance"; and the learned judge further said: "If the defendant had bought the premises subject to a lease to Breslin [the tenant], who had continued in occupation under it, a different case would have been presented"; and he held the defendant responsible for the nuisance solely on the ground that he had demised the premises with the nuisance thereon. In *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 77, 6 Am. St. Rep. 151, Virgin, J., writing the opinion said: "It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorized a continuance of the condition they were in when he let them, and is therefore guilty of misfeasance." In *Joyce v. Martin*, 15 R. I. 558,

A, owning a defective wharf used in connection with a public resort, and knowing the defect, leased the place and wharf to B, who learned of the wharf defect after accepting the lease, but continued to use the wharf and place for public resort; and in an action for damages to C, who was injured by the wharf defect, it was held that the action was maintainable against both A and B jointly, — against A solely on the ground that he knew the wharf was defective when he let it.

In *Owings v. Jones*, 9 Md. 108, the plaintiff sued for damages for injuries by falling into a vault appurtenant to the property of the defendant, and built under a sidewalk of a public street. It was shown in defense that the property had been leased by the defendant for the term of seven years, for an annual rent, and the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be liable to become unsafe in the necessary opening for the purpose of cleaning it; and it laid down the following rules: 1. When property is demised, and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happens during such possession, the owner is not liable; 2. But where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries received from such nuisance. In *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, the action was brought by a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on the trial was, that "if the jury found that the defendant was the owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover"; and this was, upon appeal, held to be a correct exposition of the law. In *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, the true rule was fully apprehended by Folger, J., who wrote the opinion. That was a case where plaintiff's horse fell through a defective pier, and the action was against a lessee who had covenanted with his landlord to make all ordinary repairs. The lessee had sublet the pier,

and was not in the occupancy thereof, and it was held that if premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public during the continuance of the lease, unless he has expressly agreed to repair, or has renewed the lease after need of repair has shown itself; and that this rule applies to a lessee out of possession who has sublet to another who is in possession. The learned judge said: "Generally speaking, the person responsible for a nuisance is he who is in occupation of the premises on which it exists. . . . As between him who is landlord and owner and him who is the lessee and occupant of the premises, there is, in general, no obligation upon the former to keep them in repair, where he has made no express contract to that effect. . . . Numerous authorities are cited. We have examined them all. It will be seen that in them the liability of the defendant is placed upon one of these grounds, viz., that he owned or had rights in the premises, and leased them with the nuisance upon them; that he was in the possession of the premises, and used them in their defective condition; that he was under a contract enforceable by plaintiff to keep the premises in repair, and failed so to do; that he, in the first instance, created the nuisance, and put it in the power of others to continue it; or that, being a municipal corporation, there was a duty upon it to repair. If there are authorities which, in the remarks of the court, reach further than this, they will be found to go beyond the needs of the case in hand."

In *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, it was held that a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee, or others lawfully upon the premises, for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended. In *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, the plaintiff's intestate was so injured by the falling of a defective pier that he died, and the action was brought to recover damages caused by his death. The defendant, the landlord, had rented the pier to a tenant, who was in possession thereof at the time of the accident; and the defendant was held liable solely on the ground that he had demised the pier while the same was in a defective condition. In *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358, it was held that where a person acquires title to land upon which is a nuisance, the mere omission to

abate or remove it does not render him liable; and that there must be something amounting to actual use, or a request to abate the nuisance must be shown. In *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 247, 50 Am. Rep. 659, it is said: "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises, knowing that they are dangerous and unfit for the use for which they are used, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But when the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident or wrong complained of, he is liable; if not so guilty, no liability attaches to him." *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, is an instructive case. There the defendants were owners of certain premises in the city of New York, which they leased to M., who, under and in accordance with a permit from the city, built vaults under the sidewalk in front thereof, with a coal-hole, which was properly constructed, and in the usual and permitted manner. Through the wrongful act of a stranger, who broke the stone supporting the iron cover of the coal-hole, the cover turned when the plaintiff stepped upon it, and he fell and was injured. In an action to recover damages, it did not appear that the defendants had any knowledge or notice of the defect, and it was held that they were not liable; that they would not have been liable had they themselves constructed the vaults lawfully, and with due prudence and care, and thereafter transferred possession of the premises to a third person without covenant on their part to repair; that if the coal-hole became a nuisance after the stone was broken, only the person who created the nuisance, or he

who suffered it to continue, was responsible; that a party out of possession and control, and who had no knowledge, actual or constructive, of the defect, could not be said to have suffered it to continue; that a landlord out of possession is not responsible for an after-occurring nuisance unless in some manner he is in fault for its construction or continuance, and that the bare ownership will not produce this result. Finch, J., said: "How can it be said that they [the defendants] suffered it [the nuisance] to continue, and so failed in their duty, if they had no knowledge, actual or constructive, of the defect, and were out of possession and control? It is quite certain that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord tending to the injury, and barely showing him to be the owner is not enough. There was no fault of commission. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of its existence, or was bound at his peril to discover and to remove it." In *Walsh v. Mead*, 8 Hun, 387, Daniels, J., said: "The erection and maintenance of a nuisance is a wrong, and by leasing the building affected by it to another person, the owner continues it, and stipulates for the enjoyment of the profit from it." In 1 Thompson on Negligence, 317, the learned author has concisely stated the law of nuisance in harmony with all these cases.

Now, within these authorities, what ground is there for imposing liability upon these defendants for this nuisance? They did not create it, and had no connection whatever with those who did create it. They were not bound by the lease to repair the pier. They did not demise the pier with the nuisance thereon, and they had no notice, actual or presumptive, of the existence of the nuisance. None of the grounds of liability exist which are mentioned by Judge Folger in *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391. They were simply entitled to the rent; it is not even proved that they actually received any. But it has never been held in any case that the receipt of rent imposes responsibility upon a landlord for a nuisance for which he is not otherwise responsible. Landlords always are entitled to rent; and if the mere receipt of rent would make them responsible for a nuisance upon the demised premises, then they would always be responsible, irrespective of other circumstances which have always been deemed necessary to create the responsibility.

The fact that the defendants, under the lease, had the right to go upon the pier and make repairs, if they should see fit to do so, is wholly immaterial in this case. Even when an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person not a party thereto. But, in such case, the third person injured, because for want of repairs the demised premises have become a nuisance, has a cause of action primarily against the tenant. But because the tenant, in case of a recovery against him, could sue his landlord for indemnity upon the covenant, to prevent circuitry of action, the person injured may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. It would have been wholly immaterial if these defendants, owners of the pier, had let it without reserving any right to go upon it for repairs, and even if they could not have gone upon it for repairs without being trespassers: *Fish v. Dodge*, 4 Denio, 811; 47 Am. Dec. 254; *Swords v. Edgar*, *supra*. There is no case which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. It was held in *Clancy v. Byrne*, *supra*, that a lessee who has covenanted with his landlord to repair is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a subtenant to whom he had let them. As he had made no covenant to repair with his tenant, and was not bound to indemnify him, the person injured could not maintain an action against him, although he had covenanted with his landlord to repair. Here, according to the law of that case, if these owners had even been under a covenant with their predecessors in the title, or with any other person but Phelan, to keep this pier in repair, their breach of the covenant and failure to discharge their duty to their covenantee would not have made them liable for the death of the child; and with much less reason can such a liability spring from a mere stipulation in a lease made by one for whose acts they are in no way responsible, which merely put it in their power to make the repairs. In cases where it is said that a landlord bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant: *Russell v. Shenton*, 2 Gale & D. 578. The whole argument on this point is summed up in the statement that, as there was here no breach

by the defendants of any duty due from them to the tenant, the stipulations in the lease do not concern a stranger thereto.

There is no authority from the reported decisions or from the text-books which imposes upon the landlord, not otherwise liable for a nuisance upon demised premises, the duty of active vigilance to ascertain their condition. A landlord has never been held responsible for a nuisance because he did not himself obtain notice of its existence. But it has always been held to be the duty of any person seeking to enforce the landlord's responsibility for a nuisance to show that he had such notice.

There are two cases to which I have not yet referred, which are so like this in all material particulars that they ought to be received as conclusive authority for the defense of this action. In *Woram v. Noble*, 41 Hun, 398, a case entirely similar to this, the action was brought to recover damages for an injury sustained in consequence of a defective coal-hole; and it appeared that the defendant became the owner of the premises in September, 1883, subject to a lease to a tenant expiring May 1, 1884, which required the tenant to make all repairs; that the coal-hole was then in the sidewalk, but it had not been constructed by the defendant, nor did he have any notice or knowledge of its defective condition, although the tenant had noticed the depression in the stone about a year previous to the accident; and it was held that the defendant could not, in the absence of any evidence to show that he was responsible for the condition of the coal-hole, or had knowledge of its defective condition, be held liable for the injury sustained by the plaintiff. The judge writing the opinion said: "We find no special decision, and no principle enunciated in any elementary work, that will furnish a basis for a recovery against the defendant in this action. He did not construct the work that became a nuisance, and he did not continue it in any legal sense." There, as here, the defendant became the owner subject to a lease, and the nuisance existed at the time he became such owner, and it was held that he could not be made liable for the accident without proof of notice to him of the existence of the nuisance. In *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 656, the action was brought to recover damages for injuries to the plaintiff's road-bed, caused by the same being washed and flooded in the years 1864 and 1865, by reason of an embankment and bridge built over a creek by a prior owner of defendant's road in 1851 or 1852. The defendant became the owner of the embankment,

bridge, and of its road by purchase at a foreclosure sale in 1857, and in February, 1863, it leased its road, including the embankment and bridge, to the Erie Railroad Company, which took possession of the road and had possession under its lease at the time of the damage complained of by the plaintiff; and the general rule was affirmed, that in order to maintain an action for damages resulting from a nuisance upon defendant's land, where such nuisance was erected by a prior owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance, but that it is not necessary to prove a request to abate it. Judge Lott, writing the opinion, said: "Where persons succeeding to the ownership of land on which a nuisance had previously been erected have been held liable for damages resulting from its subsequent continuance, it appeared either that it was after notice of its existence, or that the question of such notice had not been raised at the trial." That case is a most emphatic authority for the defendants here. There the defendant became the owner of the premises with the nuisance existing thereon, and actually leased them in the same condition to another company, which was in possession at the time of the damage complained of, and yet, in the absence of proof that the defendant had notice of the nuisance, it was held not to be liable for damages caused thereby.

It is frequently said that a landlord who has demised premises with a nuisance thereon continues liable for the nuisance, although he did not create it, because it was a misfeasance to demise them in that condition. But it will be found that all, or nearly all, the cases in which this has been said are cases in which, at the time of the demise, the landlord had notice of the nuisance. In the case last cited the defendant demised the premises with the nuisance thereon, and yet it was held not to be liable, because there was no proof of notice.

I will now notice the principal cases which are supposed to be in conflict with some of the views I have expressed, and with the conclusion I have reached. In *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486, the predecessor of the defendant had constructed its road across a stream of water in such a manner as to cause the stream to overflow and damage the lands of the plaintiff. Upon the trial the defendant insisted that inasmuch as it had no agency in building the obstruction in the stream, or in making the excavation through the bank, but

that had been done by the old company, it was not liable, and upon this ground it moved for a nonsuit, which was denied. Upon the appeal it was held that the defendant could not have the benefit of the point that there had been no request to abate the nuisance, because it was in no way taken at the trial, and hence the case was treated as if the request had actually been made and proven. The point decided, as stated in the head-note, is, that "the successor to the title and possession of property who omits to abate a nuisance erected thereon by another, after notice to do so, is liable for the damage caused by its continuance." Judge Denio, writing one of the opinions, held that an action on the case will lie against one who continues a nuisance by which damage is occasioned to the plaintiff without notice first given to remove it. He cited no authority sustaining his views, but cited authorities in conflict with them, holding that they were not binding upon the court. But it is expressly stated that the court did not pass upon the question whether the defendant was liable, without notice, to remove the obstruction and restore the bank of the stream; and the views of Judge Denio, besides having the support of no authority in this country or England, were distinctly repudiated in *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573; 10 Am. Rep. 656. In *McCarthy v. Syracuse*, 46 N. Y. 194, damage was caused by a defective city sewer which it was the duty of the city to keep in repair, and it was held liable for the damage, without notice of the defect in the sewer, because it had omitted to discharge that duty. That case bears no analogy to this. In *Irvine v. Wood*, 51 Id. 224, 10 Am. Rep. 603, the action was against lessor and lessee to recover for injuries sustained by the plaintiff from a defective coal-hole in the street. The plaintiff recovered against both defendants, and both appealed, but the lessor abandoned his appeal, and the case was argued only on behalf of the lessee, who had maintained and used the coal-hole in its defective condition, and it was held that he was liable. The main litigation at the trial was as to the liability of the lessee, which rested upon plain principles of law, and the case is authority only as to such liability. No point or claim was made at the trial that the landlord had no notice of the defective condition of the coal-hole, or that he could be made liable for the accident only upon proof of such notice, and no such point was before the court upon the appeal. In *Swords v. Edgar*, *supra*, as stated above, the action was against the landlord, who demised the pier when it

was in a defective and dangerous condition, and the case is a valuable authority for the views I have expressed. In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, and *Clifford v. Dam*, 81 N. Y. 52, the actions were in each case against the defendant, who had himself created the nuisance. While in *Bellows v. Sackett*, 15 Barb. 96, some things were said by the judge writing the opinion which are not now the law, the case was properly decided, because there the defendant, the landlord, erected the nuisance and demised the premises with the nuisance thereon.

Rex v. Pedly, 1 Ad. & E. 822, is much relied upon by the plaintiff as an authority in his favor. There the defendant purchased premises which were in the occupancy of tenants under a demise for short periods of time from the prior owner, and a nuisance arose thereon after the purchase, and after the defendant began to receive the rents. The defendant, the periods being short, was treated as having relet the premises to the tenants with the nuisance thereon, and it was held that he thereby became liable for the nuisance; and upon that ground the decision can stand in harmony with all the cases I have cited. But the court seems to have gone further, and affirmed a proposition, not necessary for the decision, that such a reversioner is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest or abating the nuisance. That proposition is unsound; and as to that, the case has been overruled and distinctly repudiated in England. In *Rich v. Basterfield*, Com. B. 784, the case of *Rex v. Pedly*, *supra*, was largely criticised, and Creswell, J., writing the opinion, said of it, that "if *King v. Pedly* is to be considered as a case in which the defendant was held, because he had demised the buildings where the nuisance existed, or because he had relet them after the user of the buildings had created the nuisance, or because he had undertaken the cleansing, and had not performed it, we think the judgment right, and that it does not militate against our present decision. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principles to be found in any previously decided cases, and we cannot assent to it." In *Todd v. Flight*, *supra*, *Rex v. Pedly*, *supra*, was cited as holding that if the defendant demised the

privy, either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance. In *Russell v. Shenton*, *supra*, it was said by Lord Chief Justice Denmon, in reference to *Rex v. Pedly*, *supra*, that "it was an indictment against the owners of houses and privies which had been built for the very purpose of being so used as to create a nuisance, unless the owner took effectual means to prevent it. These means not having been adopted, the owner, who received rents for both, was held liable for the public nuisance." In the case of *Gandy v. Jubber*, 5 Best & S. 76, the owner of premises, attached to which was an area, let the same to a tenant from year to year, and died, having devised the property, with an iron grating over the area improperly constructed, and out of repair, so as to amount to a nuisance, to the defendant, who, having no notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving rent; and it was held that he was liable for damage caused by the nuisance, on the ground that he had relet the premises with the nuisance thereon. That case is in no way an authority for the plaintiff, but by implication the point decided strongly favors the contention of the defendants. It is clear that the court was of the opinion that the defendant would not have been liable but for the fact that he had let the premises with the nuisance thereon. That case went by appeal to the exchequer chamber, and is again reported in the same volume, at page 485; and it was there strenuously contended on behalf of the defendant that he was not liable, because he could not be treated as having demised the premises with the nuisance thereon, and because he had no notice of the nuisance. The court took the case under consideration, and finally recommended the plaintiff to accept a *stet processus*,—substantially a final stay of proceedings,—and the plaintiff accepted it, evidently induced so to do because of information that the judgment would go against him. In the course of the argument in the exchequer chamber, Chief Justice Erle said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible."

The reasons why the exchequer chamber recommended that the plaintiff should accept a *stet processus* do not appear in the report. But in 9 Best & S. 15, there is what purports to be the undelivered opinion of the court in that case, showing that the court had unanimously come to the conclusion to reverse

the judgment of the queen's bench; and in the opinion the case of *Rex v. Pedly*, *supra*, was again criticised, explained, and limited as in prior cases. One question in the case was, whether a landlord who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the opinion, published in 9 Best & S. 15, the ground on which the exchequer chamber differed from that of the queen's bench distinctly appears as follows: "We agree that, to bring liability home to the owner, the premises being let, the nuisance must be one which was, in its very essence and nature, a nuisance at the time of the letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord, from year to year, having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such failing to give notice is equivalent to a reletting." That case, then, is an authority that, upon such facts as we have here, devisees of premises under a lease for a term with no power in the devisees to terminate the lease during the term, such devisees are not liable, although they received rent, for a nuisance which they did not cause, create, or authorize. In *Salmon v. Bensley*, Ryan & M. 189, a *nisi prius* case of very doubtful authority, it was held that a notice to remove the nuisance left at the premises is evidence against a subsequent occupier. That case has no bearing upon this, because the defendants were not subsequent occupiers; they never occupied, and did not continue the nuisance. The pier remained in the occupancy of Phelan. Besides, there is no question of notice in this case, as the court held, as matter of law, that the defendants were responsible if the nuisance existed at the time of the demise to Phelan. In Wood's Landlord and Tenant, 618, the author says: "When a nuisance results from such want of repair, and there is no covenant to repair on the part of either landlord or tenant, an action may be maintained against either of them therefor." But he was speaking of repairs which the landlord was bound by some law to make. But there is no general law, and no rule of law, which imposes upon the landlord the duty to make repairs upon premises in the occupancy of his tenant. At page 917 the learned author

states the proper rule, in harmony with all I have said. There he says: "The landlord's right of possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended in respect to such matters or defects in the premises as existed when the premises were let, arising from the manner of use or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting therefrom, although it only becomes a nuisance by the act of the tenant in using it for ordinary purposes. And if the tenant creates a nuisance upon the premises during the term by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet if he subsequently renews the lease with the nuisance thereon, he becomes chargeable therefor the same as though the nuisance had existed at the time of the original demise; and when a person is in possession as a tenant from year to year, each year is treated as a reletting, so that the landlord becomes chargeable for a nuisance created by the tenant during a previous year which is in existence at the commencement of the new year"; and there is more to the same effect, as there is also in Wood's Law of Nuisance, 78, 141.

If Phelan had been the mere servant or agent of the defendants, and had caused or permitted this or any other nuisance upon the pier, then the defendants would have been responsible for it, and the cases of *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, and *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767, would have been in point.

It is said that many of the cases I have cited were nuisances created by damming, obstructing, polluting, and diverting streams, and that they are not, therefore, applicable. Why are they not applicable? They were all decided by the application of the general law of nuisance, and it has never been suggested in any case that there is any law of nuisance peculiar to such cases, and that they are not to be governed by the same rules that apply to other nuisances. They announce general rules in terms applicable to all cases of nuisance.

If it is at all material, it is a mistake to assume that the children of Mrs. De Dion first became owners of this pier upon the death of their mother. Under the will of their grandfather, John Gardner, they had vested remainders therein long before the death of their mother, and long before the pier was

out of repair. They took no new title upon the death of their mother. The estate which was before in them was simply enlarged by the disappearance of the precedent estate. Were they bound in some way to divest themselves of the estate which they had long had in order to escape responsibility for a nuisance which they had not created or authorized? Or if they did not or could not do that, were they bound to go upon the pier and possibly expend in repairs more than the entire income therefrom to escape responsibility for the nuisance? And were they bound to do this, at the peril of great damages, without notice of the nuisance, while the pier was in the possession of a tenant who had hired it from a stranger to them at a small rent because it was out of repair, and who was under a duty to the public to keep it safe and in repair? If the children of Mrs. De Dion had, upon the death of their mother, demised this pier without any covenant to repair, and it had become out of repair and a nuisance during the term of the demise, they would not have been responsible for the nuisance; and why should a greater responsibility be cast upon them because the pier came to them subject to the demise? What have they done to incur the responsibility? If they had demised the pier, knowing it was out of repair, they would have been guilty of continuing the nuisance, and upon that ground would have been responsible for it. But they have done nothing. They neither created, authorized, nor continued the nuisance, and they were not bound by contract or the law to discharge a duty which rested upon the tenant.

I am confident that a holding that the defendants are liable to the plaintiffs for the consequences of this nuisance would be a departure from the law of nuisance as universally approved in the books.

I have not thus far alluded to the claim of the defendants that they may find protection in the fact that a receiver had been appointed of the rents. It is not necessary to determine whether that fact furnishes them an independent defense. The pier and other property came to them as tenants in common. One was a lunatic, and a partition on that account became important, if not necessary. An action was commenced by one tenant in common against the other two, and a receiver was appointed to take the rents which accrued after the death of their mother. The receiver thus appointed was not their agent. If he had created any nuisance or done any other wrong, they would not have been responsible for it. He

was the agent and officer of the court, bound to obey its directions, and subject to its control. It ordered him to take and retain sufficient of the rents, otherwise payable to the defendants, to make necessary repairs. Under such circumstances, with a tenant bound to make the repairs, and a receiver also bound to make them, could the owners, one a lunatic and the other two residing in Europe, without any notice of the nuisance, be charged with any responsibility therefor on the theory of fault or *delictum* on their part?

The principles here involved are very important, and I have deemed a pretty thorough examination of this case quite proper. My conclusion is, that this action, upon the facts now appearing, cannot be maintained, and that the judgment should be reversed, and a new trial granted.

DANFORTH, J., dissented from the opinion of the court. He claimed that by the will of Gardner it became the duty of the trustees mentioned in it to keep the premises in repair, and that the first object of the trust was to apply all the rents and profits, if needful, to that purpose; that the lease made by the trustee, by providing that he might, if he saw fit, enter to make repairs, in effect meant that he might enter, in pursuance of the authority contained in the trust, for the purpose of making "the necessary repairs"; that this showed that the lessor deemed himself bound to make such repairs, and that he intended to make them, and that therefore the lessor could not avail himself of the general principle which requires the tenant, and not the landlord, to make the demised structure safe for the traveler; that the right to enter included the right of supervision and inspection, and indeed the entire control of the premises so far as was necessary to enable the lessor to make all necessary repairs; and therefore if the accident had occurred while the trustee's estate continued, he would have been liable, "not only because the leased premises were defective when the lease was executed, and the responsibility incurred as a matter of law, but because he was himself bound to the duty of reparation." The judge further insisted that when, upon the death of defendants' mother, they became, as owners in fee, entitled to the rents, issues, and profits of the premises, and accepted the estate, the defendants took the place of the lessor, and assumed the duties of caring for the property, and that therefore actual notice was not material or necessary to enable the plaintiff to maintain this action against them. "As soon as the defendants acquired the right to the possession of the pier or to the rents, they were bound to know its condition, and at once guard against the danger to which the public had been already exposed, or become liable for the consequences of having neglected to do so in the same manner as if they themselves had originated the lease and the nuisance. They were able at any time to gain possession of the premises for the purpose of repairing, and thus enable them to abate the nuisance. In such a case, the holder is not exempt from liability."

NUISANCES — WHO MAY BE HELD LIABLE FOR CREATION AND CONTINUANCE OF: *Sloggy v. Dilworth*, 38 Minn. 179; 8 Am. St. Rep. 656, and cases collected in note 661; lessor of property used as a licensed bawdy-house, knowing the in-

tended use: *Gloves v. Van Studdiford*, 86 Mo. 149; 56 Am. Rep. 421; and see *Marsan v. French*, 61 Tex. 173; 48 Am. Rep. 272, and note 274; and generally, as to the liability of the lessor for nuisance on the leased premises, see *ShIPLEY v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318; *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76, and note 78; *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170; *Helwig v. Jordan*, 53 Ind. 21; 21 Am. Rep. 189. Where a lessee or grantee continues a nuisance of a nature not essentially unlawful, erected by his lessor or grantor, he is liable for it only after notice to reform or abate it: *Slight v. Gutzlaff*, 35 Wis. 675; 17 Am. Rep. 476. And on the death of the ancestor, the heir or other person succeeding to the possession can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered or contributed to injuries resulting therefrom: *Sloggy v. Dilworth*, 38 Minn. 179; 8 Am. St. Rep. 656.

SANDERS v. COOPER.

[115 NEW YORK, 279.]

INSURANCE. — THE SUBJECT-MATTER OF AN INSURANCE MUST BE ASCERTAINED FROM THE DESCRIPTION IN THE POLICY, and such extrinsic evidence as may be necessary to identify the property described, but such evidence cannot be received for the purpose of proving that the property was other and different from that described in the policy.

IF A CONTRACT OF INSURANCE RELATES TO ONE DEFINITE AND DISTINCT SUBJECT, it cannot be turned into a contract for the insurance of another and different subject on proof that the agent of the company by mistake described the wrong property in his application, especially if his authority is confined to making surveys and taking applications for insurance.

INSURANCE. — THE MINDS OF THE INSURER AND THE INSURED MUST MEET AS TO THE SUBJECT-MATTER. Hence if the insurer acted on an application describing one house, and issued a policy thereon, the insured cannot recover under such policy for the loss of another house, which was one he intended to have taken insurance upon, on the ground that he applied for an insurance on the latter, but the agent of the company, by mistake, described the former in the application.

KNOWLEDGE OF PRIOR INSURANCE WILL NOT BE IMPUTED TO AN INSURER BECAUSE HIS AGENT was put upon inquiry, or might by the exercise of diligence have ascertained the truth. It is not an agent's duty to ascertain the fact as to prior insurance, and his assumption that such insurance did not exist does not bind his principal.

PRIOR INSURANCE. — IF AN AGENT KNOWS OF A PRIOR INSURANCE WHICH HE MISTAKENLY BELIEVES TO HAVE EXPIRED, and acting under such belief procures a second policy on the same property, which contains a condition that it shall be void if the insured "shall have any insurance on the property hereby insured, not indorsed, known, or consented to by this company, or its authorized agent, in writing, this policy shall be void," this pre-existing policy is a breach of the condition, and avoids the second policy.

A. H. Sawyer, for the appellant.

A. D. Wales, for the respondent.

ANDREWS, J. Two defenses are relied upon: 1. That the building burned was not the building mentioned in the application and survey, and insured by the policy; and 2. That when the policy in question was issued, there was a prior insurance on the building destroyed in the Glens Falls Insurance Company, not consented to by the Watertown Fire Insurance Company, whereby, by the terms of the policy sued upon, it became void. The defendant, to establish the first defense, relied upon the following facts: 1. The policy, by its language, insures Landers in the sum of eight hundred dollars "on the property described in the application and survey bearing even date therewith, and which is hereby referred to as forming a part of the policy, viz., eight hundred dollars on his [Landers's] two-story dwelling-house, Afton, New York"; 2. The application on which the policy was issued describes the property to which the application relates as situated in Afton, New York, and being a tenant-house two stories high, sixteen by twenty-four, with wing sixteen by twenty-four, with two chimneys, and located sixty feet south of the dwelling-house of Landers (the applicant), and sixty feet west of a barn. This is an accurate description of the tenant-house near the dwelling-house of Landers, with the exception that its height is one and a half stories, and not two stories; 3. On the back of the application is a survey and diagram showing the dwelling-house, the tenant-house (consisting of a main part and wing), and the barn, their relative positions, and under the tenant-house is the word "risk"; 4. The mill-house (the house burned) was situated half a mile from the dwelling-house of Landers, and was also a tenant-house. It was a building two stories high, twenty by thirty feet in size, without any wing, and having but one chimney. It was distant, at the nearest part, thirty-seven feet from a steam-mill of Landers. It corresponded in no respect with the building described in the application and survey, with the single exception of height; 5. The application and survey were forwarded by Cannon, the agent, to the office of the company at Watertown, and the policy was issued thereon and mailed by the company to Landers. The company had no information as to the risk, or of any negotiations between Cannon and Landers other than was disclosed by the application.

The plaintiff, notwithstanding this apparently conclusive evidence that the house insured was the tenant-house, and not the mill-house, has recovered for the loss by fire of the mill-house, upon certain extrinsic proof submitted to the jury. It was shown that Landers, prior to the issuing of the policy in question, held two policies of insurance in the Glens Falls Insurance Company, of eight hundred dollars each, one on the tenant-house (near his dwelling-house), expiring July 1, 1873, and one on the mill-house, expiring May 1, 1874, each for three years, at the same rate of premium. The local agent of the Glens Falls Insurance Company, in the spring or summer of 1873, removed, and sold out his business to Cannon, the local agent of the defendant's company, who transferred to him, among other things, an "expiration-book," in which the two policies to Landers were entered, one entry being "Thomas Landers, Glens Falls; number of policy, 197; property, Afton, \$800; premium, \$4.80; expiring 1st of July, 1873"; and the other, "Thomas Landers, Glens Falls Insurance Company; number, 351; farm property in Afton, \$800; premium, \$4.80; rate, 60 cents; expiring the 1st of May, 1874." It will be noticed that the entries do not show on their face to what particular building they severally apply. The plaintiff's version of the circumstances which preceded the issuing of the policy in question is substantially that the agent, Cannon, in the spring of 1873, met Landers, and informed him that the policy on the mill-house was about expiring, and asked him if he did not want it renewed, stating that the former agent of the Glens Falls company had left, and he (Cannon) had his papers, and was doing his business, and that he was the agent of the Watertown Fire Insurance Company, which was a good company, and solicited Landers to take a policy in that company, to which he finally consented. The testimony of Landers, to the point that the negotiation with Cannon related to a renewal of the policy on the mill-house, is corroborated, to some extent, by other members of his family. The policy which expired in July, 1873, was the policy on the tenant-house. The policy on the mill-house did not expire until May, 1874. It was the policy on the tenant-house which needed to be renewed, and not the policy on the mill-house. But Landers relied, as he claimed, on the assurance of Cannon that it was the policy on the mill-house which would expire first, and thereupon authorized him to procure a new insurance upon that building. Within a short time after the

conclusion of the negotiation, Cannon made out the application and survey, and signed the name of Landers to the application, and forwarded them to the defendant. The application and survey, as has been shown, related to the tenant-house, and not to the mill-house. Cannon, on the trial, contradicted the testimony of Landers and his witnesses as to the fact that the negotiation between himself and Landers related to the mill-house, and testified that the tenant-house was pointed out by Landers as the one upon which the policy was about to expire, and that the proposition on his part to procure a new policy related to the tenant-house, and not to the mill-house. Upon this state of facts, and the additional fact testified to by Landers that he did not authorize Cannon to sign any application, and that he had no knowledge of the application or survey until after the fire, the court submitted to the jury to find whether the application was authorized by Landers, and instructed them that if it was made without his authority or knowledge, and he did not know of the representations therein, they should disregard the application and survey, and determine the case upon the point whether the negotiation between Landers and Cannon related to the mill-house; and instructed them, in substance, that if they found that it did relate to the mill-house, and not to the tenant-house, the policy covered the mill-house, and the plaintiff was entitled to recover. The defendant, before the submission of the case to the jury, moved that the case should be dismissed on the grounds, among others, that the policy did not cover the mill-house, but the tenant-house, and that, assuming the policy covered the mill-house, there was a prior existing insurance thereon not consented to by the defendant.

We think the case was tried and submitted to the jury upon an erroneous view of the law. The action was brought distinctly and solely upon the policy of August 1, 1873, and to enforce the contract of insurance contained in that instrument. The building burned was the mill-house; and unless the policy was upon that building, the plaintiff did not establish the cause of action alleged in the complaint. The subject of the insurance is to be ascertained from the description in the policy, and such extrinsic evidence as may be necessary to identify the property described. But extrinsic evidence which goes beyond the purpose of aiding in the interpretation of the written contract, and tends to show that the subject thereof was other and different from that described in the

written instrument,—that is to say, in this case, that the building intended to be insured was the mill-house, although not the building actually covered by the policy,—while it might tend to establish a case for the reformation of the contract, would be inadmissible to sustain an action to enforce the contract as written, as though it applied to the building intended to be covered, but not described in the policy. The policy was issued upon a written application and survey made by Cannon, the local agent of the company, in the name of Landers, and forwarded by the agent to the main office of the company. The company approved the application, and thereupon issued and mailed the policy to Landers. It must be assumed, upon the finding of the jury, that the negotiation between Cannon and Landers related to an insurance on the mill-house, and not on the tenant-house; and further, that the agent, in making the written application and signing Landers's name thereto, and in making the survey and diagram of the premises, acted without Landers's authority, and that Landers had no knowledge of the representations made by the agent to the company until after the fire.

The evidence leaves no possible room for question that the company, when it issued the policy, intended to insure the tenant-house, and not the mill-house. Nor can there be any doubt that the policy describes the tenant-house, and not the mill-house, as the subject insured. It is quite impossible to treat this policy as a contract insuring the mill-house, if the application and survey are considered in ascertaining the subject of insurance. It is only by rejecting them that the subject is left in any possible doubt. This the trial court permitted the jury to do, upon the theory that the representations in the application and diagram were the unauthorized acts of the agent, and were not therefore binding upon Landers. In substance, the court permitted the jury to strike from the written part of the policy the clause referring to the application and survey, and to regard only the words, "eight hundred dollars on his [Landers's] two-story dwelling-house," which, standing alone, describe with sufficient accuracy the mill-house, and then to find that the policy was one upon the mill-house, as the agent, Cannon, and Landers intended.

The court treated the case as analogous to those which hold,—1. That a contract of insurance is not defeated by a misrepresentation as to some fact material to the risk, or made so by the terms of the contract, contained in an appli-

cation prepared by the agent in the name of the insured, but without his authority, and upon which the company acted in issuing the policy: *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 496; *Sprague v. Holland Purchase Ins. Co.*, 69 Id. 128; *Vilas v. New York City Ins. Co.*, 72 Id. 590; 28 Am. Rep. 186; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253. 2. To the class of cases where the agent, having been authorized by the insured to fill out the application in his name, misstated, by mistake or inadvertence, the information given by the insured, and thereby misled the company: *Rowley v. Empire Ins. Co.*, 36 Id. 550; *Baker v. Home Life Ins. Co.*, 64 Id. 648; *Grattan v. Metropolitan Life Ins. Co.*, 92 Id. 274; 44 Am. Rep. 372; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243. 3. To the cases which hold that a company cannot insist upon a condition declaring the contract to be void, if a certain fact or situation exists not represented to the company and indorsed on the policy, provided the company or its authorized agent knew the fact or situation relied upon to defeat the contract at the time the contract was made: *Van Schoick v. Niagara Fire Ins. Co.*, 68 Id. 434; *Richmond v. Niagara Fire Ins. Co.*, 79 Id. 230; *Short v. Home Ins. Co.*, 90 Id. 16; 43 Am. Rep. 138.

In none of these cases was there any question as to the subject of the insurance. In all of them it was conceded that the policy covered the building or property destroyed by the fire. The matters alleged as constituting a defense related to some incident of the contract, or to the performance of some condition collateral to the express object of the contract. In cases falling within the two classes of cases first mentioned, the fault was committed by the agent of the defendant, and it is held that, as between the company and the insured, the company should bear the loss. In cases of the third class it is held that it could not have been the intention that the policy should be defeated by reason of an omission to communicate facts known to the company when the contract was made, or the failure to have the written recognition of the company of their existence. The courts in these cases apply the doctrine of waiver or estoppel to prevent fraud or injustice.

But the principle which relieves the party insured from responsibility for unauthorized representations, made by the agent of the insurer in respect to some incident of the risk, and permits them to be disregarded in an action to enforce the contract, has no application where the point in issue is as to

the subject of the insurance, and the contract is explicit upon that point. If the contract of insurance relates to one definite and distinct subject, it cannot be turned into a contract for the insurance of another and different subject on proof that the agent of the company, by mistake, described the wrong property in his application. The agent's authority here was to "make surveys and take applications for insurance." He had no authority to enter into contracts of insurance in behalf of the company. The company passed upon the applications and accepted or rejected them, in its discretion. In determining the question whether the policy issued covered the mill-house or the tenant-house, the papers on which the company acted were material evidence. In ascertaining to which subject the policy applied, it is immaterial whether the application was made by the authority of the insured or not, or whether it was genuine or forged. There must be a meeting of minds between the parties to a contract before a contract is formed. If the facts show that the company intended to insure the tenant-house, and the written contract applies to that house, the plaintiff cannot recover in this action, although he may have intended to procure an insurance on the mill-house, and by the agent's fault the application was made to refer to the tenant-house. If there is any remedy against the company for the mistake or carelessness of the agent, it is not available in an action to enforce a contract relating to one subject, as if it were a contract relating to another subject. I am not aware of any principle in the law of estoppel which prevents the defendant from showing that the contract relates to the tenant-house, or which justifies the court in excluding from the consideration of the jury, in the determination of the issue, the application and survey upon which the company acted because made without the authority of the insured by the company's agent. We are of opinion that the defense that the policy was not upon the mill-house, but was upon the tenant-house, was clearly established, and that upon this ground a nonsuit should have been granted.

The second defense of prior insurance is, also, we think, a barrier to a recovery. It is a condition of the policy that "if the insured shall have, or shall hereafter make, any other insurance on the property hereby insured, not indorsed, known, or consented to by this company, or its authorized agent, in writing, this policy shall be void." This defense proceeds on the assumption that the policy was a contract insuring the

mill-house. It is conceded that Landers had an insurance on the mill-house in the Glens Falls Insurance Company for eight hundred dollars, existing when the policy now in question was issued, and which ran to May 1, 1874, and no indorsement of the prior insurance was made on the policy in question, nor is there any written consent to its existence by the Watertown Insurance Company or its agent. This *prima facie* was a breach of the condition, and rendered the policy of the latter company void: *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414; 40 Am. Rep. 554. The answer made is that Cannon knew of the prior policy. He knew that there was a policy on the mill-house, and also on the tenant-house. But the strongest position for the plaintiff which the evidence justifies upon this point is, that Cannon believed, and so represented to Landers, that the policy on the mill-house was the one expiring July 1, 1873, whereas it was the policy on the tenant-house which expired at that date. The most that can be said is, that the agent made a mistake as to the facts. But this was not equivalent to notice of an outstanding insurance so as to charge the company. The plaintiff, to avoid the effect of the condition, was bound to show that, as matter of fact, the agent knew of the outstanding insurance. It was not sufficient to relieve the plaintiff that the agent was put upon inquiry, or might by the exercise of diligence have ascertained the truth. The insured, who had procured the policies in the Glens Falls Company, could not rely upon the assurance of the agent, himself making no investigation, and cast the burden of the agent's mistake upon the Watertown Insurance Company. It was not the agent's duty to ascertain the fact as to prior insurance, and his assumption that no such insurance existed did not bind his principal.

For the errors stated, the judgment should be reversed, and a new trial granted.

INSURANCE. — CONSTRUCTION OF POLICY with reference to situation of property insured: *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685. General rule is, that the contract of insurance is to be construed with reference to the subject-matter of insurance, and with a view to the object and intention of the parties, as the same may be gathered from the instrument: *Id.*, and cases collected in note 689. Where the application is for insurance on a frame building and cellar, and is referred to in the policy in aid of the description, the omission from the policy of the words "the cellar" is immaterial, and the insured, in case of loss, is entitled to recover for the same property as though these words had been copied into the policy: *Ment v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158. So in an action on a policy

of fire insurance on a junk-dealer's stock of "rags" and "old metals," evidence is competent to show that by usage in that trade "rags" includes all articles used in the manufacture of paper, and "old metals" includes such articles as old rubber and old glass: *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277.

PAROL EVIDENCE THAT ENLARGEMENT OF BUILDING INSURED WAS CONTEMPLATED at the time the insurance was effected is inadmissible to vary the terms of the written contract of insurance relative to the enlargement of insured buildings: *Frost's etc. Lumber Works v. Insurance Co.*, 37 Me. 300; 5 Am. St. Rep. 846.

INSURANCE. — Parol testimony is incompetent and inadmissible to vary, alter, or modify the stipulations of a written contract of insurance: *Gomila v. Hibernia Ins. Co.*, 40 La. Ann. 553. But where the policy does not fix a place of payment of the premium, or the name of the person to whom it must be paid, parol testimony is competent to show the agreement on these points between the assured and the agent who effected the insurance: *Blackerby v. Continental Ins. Co.*, 83 Ky. 574.

POST v. WEIL.

[115 NEW YORK, 361.]

CONDITION SUBSEQUENT, WHAT IS NOT. — Mere words should not be deemed sufficient to constitute a condition, and to entail the consequence of the forfeiture of the estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and the necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was intended to accomplish, but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason.

CONSTRUCTION OF WORDS IN A DEED SHOULD BE THAT WHICH, ON A GENERAL VIEW of the instrument and of the intention of the parties, seems most likely to accomplish what they intended.

COVENANTS AND CONDITIONS MAY BE CREATED BY THE SAME WORDS. — In order that a covenant shall be read from the words of the instrument, they need not be precise nor technical, nor in any particular form. Hence, whether words amount to a condition, a limitation, or a covenant may be a matter of construction, depending on the contract.

CONSTRUCTION OF DEED. — **TECHNICAL WORDS MAY BE OVERLOOKED** where they do not inevitably evidence the intention of the parties. The construction of clauses which might be interpreted either as conditions subsequent or as mere covenants must be against the conditions involving the forfeiture of the estate.

WHERE A RESTRICTION IS INSERTED IN A DEED AGAINST UNDESIRABLE STRUCTURES OR BUILDINGS, it will be presumed that the restriction was inserted for the purpose of protecting rights which the grantor had in adjacent property.

THOUGH A DEED CONTAINED A CLAUSE AS FOLLOWS: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or build-

ings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," this condition will not be construed as a condition subsequent, the failure to observe which will forfeit the estate, but as a mere covenant for the protection of the interests of the grantor. The office of this clause is merely to restrain the generality of the preceding clauses by limiting the uses to which the premises might be put.

James C. Carter, for the appellants.

William M. Evarts, for the respondent.

GRAY, J. This action arose out of the refusal of the appellant's testator to complete his agreement to purchase certain lots of land in the city of New York.

Their sale had been at public auction, and by its terms an indisputable title was offered to purchasers. Weil, the appellant's testator, refused to accept the deed which was tendered to him, on the ground that by the provisions of a former deed on record, and through which the title of the vendors was derived, the property of which these lots were part was subject to the operation of a condition subsequent, to wit, a condition that no part of the premises should ever be used or occupied as a tavern. Whether this objection was sound and available to Weil, is the question which is involved in this appeal. After a careful consideration of the facts, and upon a review of the whole situation, I am unable to find any serious difficulty in reading the clause in question as a covenant, whether we consider it on principles of strict law or of common justice. Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason. The operation of this clause, as contended for by the appellant, would have been to effect a great injustice; whereas if, as we read it, it was intended as a covenant for the protection of property, no prejudice could accrue to any one, and the purpose in the original grant would be respected and preserved in all its integrity. I am aware of the difficulty which attends the discussion of the legal question involved in this case, and also of the importance which is

given to it by the fact that the courts below have held the clause in the deed to be a condition subsequent, while they have enforced the performance of the agreement of purchase upon other grounds. I shall therefore briefly review the facts as they appear in the record before us, in order better to demonstrate that the conclusion to be drawn from them, as to the probable intention of the parties, is, that the clause under consideration could only have been inserted as a covenant.

The premises in question were formerly part of a large estate lying in the upper portion of New York island, and known as Monte Alta. That estate and an adjoining estate, known as Claremont, were owned and occupied as farms and country residences by one Michael Hogan. In 1807 he entered into an agreement in writing with one Jacob Mark for the sale to him of the Monte Alta estate for a sum of sixteen thousand dollars, and the agreement contained this clause: "Upon the special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." In 1811, four years afterwards, Hogan and wife deeded to Robert Lenox, Jacob Stout, and John Wells, upon certain trusts, both of said estates; that of Monte Alta, however, subject to the agreement with Mark. These facts are disclosed, not by the agreement and deeds themselves, for they do not appear to have been recorded, and they were not produced, but from subsequent deeds, which were made by these grantees or trustees of Hogan and the Hogans, in conveyance of the properties to others. We are without information as to the reason for the non-completion of Hogan's agreement with Mark from the year 1807, when it was made, until the year 1811, and we know nothing concerning the nature of the trusts upon which Lenox and his associates, in the trust referred to, received and held the properties. A few months after Hogan's conveyance to Lenox and others, Monte Alta was conveyed to Mark by a deed, in which were joined, as grantors, Hogan and wife and the said trustees. That deed recited the facts of the agreement of Hogan to sell to Mark and of the conveyance by Hogan and wife to Lenox and others as trustees, subject to that agreement. It conveyed the fee of the premises free of encumbrances, and with covenants of title and warranty, but with the following provision, contained in the *habendum* clause, viz.: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or

buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind."

The Hogans' grant was of their right, title, interest, dower, and right of dower, etc., in or to the premises described; while that of Lenox and others was directly of the premises themselves. It is quite probable that the union of the Hogans, as grantors, was to perfect the record title, which the absence from the records of their deed to Lenox and others might affect, and to prevent any question from being raised as to the validity of Mark's title. In the conveyance subsequently made, in 1812, of the Claremont estate, the grantors were the same as in that of Monte Alta, and the deed was similar in form; but it did not contain the clause respecting the use of the premises, which I have quoted from the *habendum* clause in the deed of the Monte Alta property. In 1816 a release of that restrictive clause was, as matter of fact, executed, and the title was thus freed from any question which might arise by reason of its existence; but as this release had not been recorded, and was lost at the time of the sale and of the tender of the deed by the vendors, and was not discovered and recorded until about two years afterwards, and after the commencement of this suit, it cannot be considered in determining upon the right of Weil to reject the title when the deed was tendered to him. He was entitled to rest upon the state of facts, as it was proved to be, when he refused to accept the deed. In 1819, Lenox and others executed to Hogan an instrument, which, after reciting that they had settled and accounted with him touching the trust property by him conveyed to them in 1811, "as far as the same hath been sold, appropriated, collected, received, or disposed of by them," assigned and conveyed to him whatever remainder there might be of the trust property, and Hogan, by the same instrument, released them from all claims respecting the execution of the trusts. In 1821, Joel Post became the owner of both of these estates, and he and his heirs held the same from that time until the sale by the heirs in 1873.

These are all the material facts in the case. When this purchaser objected that the estate was subject to a common-law forfeiture because of the condition subsequent reserved in the deed to Mark, the vendors answered that the tripartite deed to Mark did not reserve a condition, on the grant in fee, upon which a forfeiture would inure to the grantor, or his

heirs, in case a tavern should, at any time, be kept on the lands comprising the Monte Alta estate; but a covenant which, running with the land, would, while kept alive, prove an equitable protection against any injury from its breach, in favor of any subsisting interest, entitled to insist upon a performance of the covenant.

In that construction of the clause in the Mark deed, we think the plaintiffs were right, and as that conclusion would dispose of the case, no other of the answers which they make in defense of their title need be considered.

I understand the appellant's counsel to concede that his appeal must succeed on the sole point that the reservation pointed out in the deed created a condition subsequent. And, in fact, it must be so; for if it created a covenant, the union of both of the estates in Joel Post in 1821 would have the natural and legal result of extinguishing the covenant.

Although the words of the clause in question are apt to describe a condition subsequent reserved by a grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties; for covenants and conditions may be created by the same words. In order that a covenant shall be read from the words of an instrument, they need not be precise, nor technical, nor in any particular form. In Bacon's Abridgment, Covenant, A, it is said: "The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." In Sheppard's Touchstone, 161, 162, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words." Chancellor Kent, in his Commentaries (vol. 4, 132), in speaking of whether a clause in a deed shall be taken to create a covenant or a condition, says: "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument."

The chancellor sums up the matter in this language: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case." Lord Mansfield said (1 Burr. 290) that no particular technical words are requisite towards making a covenant; and Lord Eldon said (15 Ves. 264) that covenants may be for almost anything. That they have frequently been inserted in conveyances to maintain the eligible character of property adjoining the parcel conveyed, by protecting it against the erection of nuisances, or of offensive structures, or against the carrying on of an injurious or offensive trade, is a familiar fact. It seems unnecessary to cite from the opinions of judges, or of the writers upon this subject of jurisprudence; for there is a general *consensus* in opinion among them that the question is one always open to the determination most consistent with the reason and the sense of the thing. Reference, whether it be to the earlier or later reports, fails to aid us in deducing from them a defined principle of construction. Many, if not most, of the early cases have been those turning upon the construction of clauses in leases, and in each case, so far as the examination I have been able to give enables me to say, the court construed the clause as the circumstances and facts of that particular case seemed to demand.

I would not pretend to reconcile all the decisions which have been made upon the subject, but I readily extract the principle that technical words may be overlooked, where they do not inevitably evidence the intention of parties. I think the tendency of the law has been to assume towards this vexed question, as towards others which have come down from the days of the old common law, a more scientific attitude. So if the only reason for construing a clause is in the technical words which have been used, the court may disregard them in performing the office of interpretation. If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving forfeiture of estates. In this

connection, it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor, or his heirs, to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance in connection with the circumstances of the case and the intent to be fairly presumed therefrom.

Now, the first significant feature of this case which may be referred to in determining the intention is the agreement between Hogan and Mark. That was the agreement by which the one was to sell and the other to buy Monte Alta. In it was inserted a "special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." That was the agreement or understanding of both parties as to the restriction upon the use the premises might be put to. Then we are to presume, from what took place in the conveyance afterwards by Hogan to the trustees of both the Monte Alta and Claremont estates and their subsequent accounting with him, that Hogan had become financially embarrassed, and had sought this equitable mode of settling with his creditors. But when the trustees carried out the agreement which Hogan had made with Mark, and deeded the Monte Alta property to Mark, they incorporated in their deed the restriction which had been agreed to in the contract as to the use of the property. Now, the obvious and only purpose which Hogan could have had in view when the contract was made was to protect the adjacent property, which he then owned, from being injured by the vicinity of an undesirable structure or business. I think we all will agree that the presumption here, as in every other case where a restriction is inserted in a deed against undesirable structures or trades, is, that the insertion was for the purpose of protecting rights which the grantor had in adjacent property. In this case the clause obviously was for the benefit of the Claremont estate. This view is re-enforced by the fact that when the trustees came to sell the Claremont property no such condition was inserted in that deed. When the trustees disposed of the Monte Alta property, Hogan had ceased to have any interest in it, or other than in

having it bring all that could be obtained from a sale of the properties in order to free himself from his embarrassments. When the legal estate became vested in the trustees, their duty was to make the sales yield all that was possible. They had no interest to subserve by conveying the property subject to any condition subsequent. The effect, however, of a covenant in the deed to Mark, covering a restriction like that in the agreement of the parties, would be to enhance the market value of the other property by preserving to the whole an eligible character.

An intention that the restrictive clause should operate as a condition subsequent seems hardly supposable under the circumstances. Except we take the words literally, no reason suggests itself for that construction. Hogan had no legal estate in the property at the time of the conveyance. What interest could he then have which the trustees might be supposed to subserve, or which he might be supposed to insist upon, in securing a reverter of the one Monte Alta estate to himself or his heirs? None is apparent, and I say, therefore, that the reason and the sense of the thing indicate that the clause is to be read as a covenant.

In construing a clause which imports into an instrument a restriction, or imposes an obligation not to do something, reliance should be placed upon the known or supposable aim of the grantor, or upon the sense of his act. So long as technical words are to be deemed unavailing to control interpretation, we should disregard them, and have resort to what may furnish some evidence of the underlying intention. In speaking of the sense of the act, I refer as well to the apparent object to be attained, as to the mode resorted to in order to effect it. What reason have we to justify us in attaching to these particular words so technical a meaning, and to freight them with such serious consequences, when it appears that no such interest exists in the grantors as demands a reservation of such a condition, or makes it in the slightest degree important? Where does the necessity exist for such a technical construction?

Here the grantors of the legal title had no interest in creating a reverter to themselves; for they were mere trustees. Their grantor, whatever his beneficial interest in the trust, had no apparent interest to subserve which is pointed out, or which is discoverable in planning a reverter of the estate for a breach of condition. There was no interest, which was not adequately

met by the creation of a covenant or limitation in trust that the property should not be used for the one certain purpose mentioned. I think it more agreeable to reason, as it is to the conscience, and it well comports with the character and origin of this deed, if we say that the office of this clause was simply to restrain the generality of the preceding clause: *Chapin v. Harris*, 8 Allen, 594.

The words "provided always, and these presents are upon this express condition," seem to me to serve the purpose of restricting that use of the premises, which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one that words alone should not be deemed to create a condition subsequent, and to be capable of importing possible future forfeiture of estate, except where they do introduce some new clause, the sense of which is not referable to and in qualification of some preceding clause, and evidences some part of the consideration for the grant of the property, by the imposition of an obligation upon the grantee. Looking at these words, may we say, as they stand in the deed, that they are conditional in sense, when they, in reality, serve to qualify the generality of the grant in the language which precedes them. I think we cannot, in reason.

In *Avery v. New York Cent. etc. R. R. Co.*, 106 N. Y. 142, we have a late exposition of the views of this court upon the effect to be given to language in deeds purporting to convey upon express conditions. In that case it was sought to enjoin the defendant from maintaining a fence upon a strip of land, dividing its depot premises from the plaintiff's hotel premises, and from thus blocking up a passage-way between the hotel and depot. The land upon which defendant built the fence was conveyed by deeds, which contained the following provisions: "This conveyance is upon the express condition that the said railroad company, its successors or assigns, shall, at all times, maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, so-called [being the plaintiff's premises], adjacent to the premises hereby conveyed," etc. The grantors in these deeds had acquired title under a will to the hotel property, and their testator had been the grantor of the property used by the defendant for its depot. The defendant denied the right of plaintiff, to whom the hotel property had been leased by the devisees, to maintain the action, alleging that the language of the provision is

the deeds created a condition subsequent, which could only be taken advantage of by the grantors and their heirs. The plaintiff claimed that it must be construed as a covenant. Judge Peckham, delivering the opinion of the court, said: "We incline to the construction contended for by the plaintiff. The fact that the deed uses the language 'upon condition,' when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. . . . Construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation and to view the case in the light of such surroundings." After referring to the facts, he writes: "All these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the hotel property, and was not meant to create a condition subsequent. . . . It was intended to be an agreement or covenant between the parties, running with the land, providing for this access or right of way, so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage: *Stanley v. Colt*, 5 Wall. 119; *Countryman v. Deck*, 13 Abb. N. C. 110. Courts frequently, in arriving at the meaning of the words in a written instrument, construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damages can be recovered: *Hilliard on Real Property*, 4th ed., 526, sec 13; 2 *Washburn on Real Property*, 3d ed., c. 14, subd. 3, pp. 3 et seq."

The avenue of reasoning by which the court reached their conclusion in that case is the one which ought to lead us to our conclusion now: that the clause in question in the case at bar was intended as a restriction, created for the benefit of the adjoining property, expressed in the strongest terms, and which was enforceable as a covenant running with the land, and was not a condition subsequent, imposed for the personal benefit of the grantors and their heirs.

For the reasons stated, the judgment appealed from should be affirmed, with costs.

DEEDS — CONDITIONS SUBSEQUENT: *Vail v. Long Island R. R. Co.*, 106 N. Y. 283; 60 Am. Rep. 449, and note 451; *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; *Farnham v. Thompson*, 34 Minn. 331; 57

Am. Rep. 59. Conditions subsequent are not favored in law or raised by inference or implication: *Rawson v. School District*, 7 Allen, 125; 83 Am. Dec. 670; and are to be strictly construed, especially when relied upon to work a forfeiture: *Emerson v. Simpson*, 43 N. H. 475; 80 Am. Dec. 184; 82 Id. 168; and they are rarely enforced in equity so as to divest an estate for a breach, though often relieved against: *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638.

WORDS WHICH CREATE ESTATE UPON CONDITION: *Rawson v. School District*, 7 Allen, 125; 83 Am. Dec. 670; *Gilbert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785.

CONDITIONS AND LIMITATIONS IN DEEDS DISTINGUISHED: *Smith v. Smith*, 23 Wis. 176; 99 Am. Dec. 153.

DEEDS — CONSTRUCTION OF CONDITIONS SUBSEQUENT. — To create a condition subsequent in a deed, apt words must be used to signify such intention on the part of the parties; such as "on condition," "provided always," "if it should happen," etc.: *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142; and if it be doubtful whether a certain clause in a deed should be construed as a covenant or a condition, the courts incline in favor of the former: *Woodruff v. Woodruff*, 44 N. J. Eq. 349. A deed with a condition subsequent can be defeated for condition broken only by a re-entry of the grantor or his heirs: *Missouri H. Soc. v. Academy of Science*, 94 Mo. 450.

DEEDS — CONSTRUCTION OF, GENERALLY. — The rule of construction of deeds is to give effect to the intention of the parties, and such intention must be ascertained from the wording of the deed itself, the situation and circumstances of the parties thereto, and the subject-matter of the conveyance; all parts of a deed must be construed together as a whole, and generally the construction should incline in favor of the grantee, and against the grantor; but technical rules must never be applied so as to defeat the plain and manifest intention of the parties: *Witt v. St. Paul etc. R'y Co.*, 38 Minn. 123; *Miller v. Miller*, 17 Or. 423; *Jerome v. Ortman*, 66 Mich. 668.

RIGGS v. PALMER.

[115 NEW YORK, 506.]

HEIR OR DONEE WHO MURDERED HIS ANCESTOR OR TESTATOR to obtain the latter's property will not be permitted to have any benefit as such heir or donee.

CONSTRUCTION OF STATUTE. — It is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.

ALL LAWS MUST BE CONTROLLED IN GENERAL OPERATION AND EFFECT BY THE GENERAL FUNDAMENTAL MAXIMS OF THE COMMON LAW, such as that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.

Leslie W. Russell and C. E. Sanford, for the appellants.

W. M. Hawkins, for the respondents.

EARL, J. On the thirteenth day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried and without any issue. The testator, at the date of his will, owned a farm and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Bresee, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that in lieu of dower and all other claims upon his estate, in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, Can he have it? The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate, and that, therefore, it must have effect according to the letter of the law.

It is quite true that statutes regulating the making, proof, and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.

The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them, this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to

them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation; and Rutherforth, in his Institutes (p. 407), says: "When we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express."

Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view; for *qui hæret in litera, hæret in cortice*. In Bacon's Abridgment (Statutes, I, 5), Puffendorf (b. 5, c. 12), Rutherforth (pp. 422, 427), and in Smith's Commentaries (814), many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction, and it is said in Bacon: "By an equitable construction, a case not within the letter of the statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is, that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary

to the statute, but in conformity thereto." In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: *Æquitas est correctio legis generaliter latæ, qua parti deficit*. If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 Blackstone's Commentaries (91), the learned author, speaking of the construction of statutes, says: "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . . When some collateral matter arises out of the general words, and happen to be unreasonable, then the judges are in decency to conclude that the consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity and only *quoad hoc* disregard it"; and he gives as an illustration, if an act of Parliament gives a man power to try all causes that arise within his manor of Dale, yet if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.

There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the sabbath, and yet, giving the command a rational interpretation founded upon its design, the infallible judge held that it did not prohibit works of necessity, charity, or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.

Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims

of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice Field, writing the opinion, said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside; and so a particular portion of a will may be excluded from probate or held inoperative, if induced by the fraud or undue influence of the person in whose favor it is: *Allen v. McPherson*, 1 H. L. Cas. 191; *Harrison's Appeal*, 48 Conn. 202. So a will may contain provisions which are immoral, irreligious, or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate, and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house,

and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy.

Under the civil law evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered: Domat, pt. 2, b. 1, tit. 1, sec. 3; Code Napoleon, sec. 727; Mackeldy's Roman Law, 530, 550. In the Civil Code of Lower Canada, the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed.

For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.

My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

Our attention is called to *Owens v. Owens*, 100 N. C. 240, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was, nevertheless, entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune

to survive her husband, and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow, and willfully and intentionally deprives herself of the support and protection of her husband. As she might have died before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim, *Volenti non fit injuria*, should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result, first upon the trial of Palmer for murder, and then by the referee in this action. We are therefore of opinion that the ends of justice do not require that they should again come in question.

The judgment of the general term and that entered upon the report of the referee should therefore be reversed, and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather, he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother, and the widow of the testator under the antenuptial agreement, and that the plaintiffs have costs in all the courts against Elmer.

GRAY, J., dissented. He insisted that the court was bound by the rules of law which had been established by the legislature; that the question the court was dealing with was whether a testamentary disposition can be altered or a will revoked after the testator's death through an appeal to the courts, when the legislature has described exactly when and how wills may be altered and revoked. The statutes of the state, he said, "have prescribed various ways in which a will may be altered or revoked, but the provision defining the means of altering and revoking implies a prohibition of altering and revoking in any other way. The words of the section of the statute are: 'No will, in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, or otherwise,' etc. Where, therefore, none of the

cases mentioned are met by the facts, and the revocation is not in the way described in the section, the will of the testator is unalterable. I think that a valid will must continue as a will always, unless revoked in the manner provided for in the statute. Mere intention to revoke a will does not have the effect of revocation. The intention to revoke is necessary to constitute an effective revocation of the will, but it must be demonstrated by one of the acts contemplated by the statute; as Woodworth, J., said, in *Dan v. Brown*, 4 Cow. 490; 15 Am. Dec. 395: 'Revocation is an act of the mind which must be demonstrated by some outward and visible sign of revocation.' The same learned judge said, in that case: 'The rule is, that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will.' I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it; for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee, nor is there any such contractual element in such a disposition of property by a testator as to impose or imply conditions in the legatee. The appellant's argument practically amounts to this: that as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provisions, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it. But more than this, to concede appellants' views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent's penalties by depriving him of his property? The law has punished him for his crime, and we may not say that it was an insufficient punishment. In the trial and punishment of the respondent the law has vindicated itself for the outrage which he committed, and further judicial utterance upon the subject of punishment or deprivation of rights is barred. We may not, in the language of the court in *People v. Thornton*, 25 Hun, 456, enhance the pains, penalties, and forfeitures provided by the law for the punishment of crime."

FRAUD. — INNOCENT PERSON CANNOT AVAIL HIMSELF of an advantage obtained by the fraud of another unless there is some consideration moving from himself: *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268; 9 Am. St. Rep. 698.

STATUTES — CONSTRUCTION OF: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and cases collected in note 53. In construing statutes, the intention of the makers must be regarded, and what is within that intention is within the statute, though not within the letter, while what is within the letter of the statute, but not within the intention of the makers, is not within the statute: *Mayor etc. v. Root*, 8 Md. 95; 63 Am. Dec. 692; and see *Tyman v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 239.

CONSTRUCTION OF STATUTES. — Who must Construe — Province of the Courts. — It is the province of the courts to merely interpret and declare what is

meant by a statute enacted by the legislature: *Henry v. Evans*, 97 Mo. 47. Courts must declare what a law means, and apply it to particular facts in deciding causes: *Shepherd v. Wheeling*, 30 W. Va. 479. So that courts cannot pass upon the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character: *Id.* It is the duty of the court to construe an ordinance only when arising in a particular suit before it: *Platt v. Chicago etc. R'y Co.*, 74 Iowa, 127. But a court cannot insert words into a statute which were not used by the legislature; for its province is to ascertain the meaning of a statute from the words used, without adding thereto or taking therefrom: *Steere v. Brownell*, 124 Ill. 27.

Province of the Legislature. — The question of the expediency and policy of a statute is for the legislature, and cannot be reviewed by the courts: *People v. Fleming*, 10 Col. 553. The province of the legislature is to declare what the law shall be in the future, including of course the power of revoking and annulling what has been the law in the past: *Shepherd v. Wheeling*, 30 W. Va. 479. It is the province of the legislature, not of the courts, to decide whether a statute violates a provision of the constitution providing that where a general law can be passed which will operate uniformly and effect the desired result, a special law must not be enacted: *Evansville v. State*, 118 Ind. 426. Powers clearly legislative in their nature, not expressly denied to the legislature, are not to be denied by mere implication, so long as they would not obstruct the operation and exercise of other powers expressly granted to the legislature: *Smisson v. State*, 71 Tex. 222; *People v. Fleming*, 10 Col. 553.

Rules of Construction — Intent of the Law-makers. — In all interpretations of statutes, the courts must look diligently for the intention of the law-makers, keeping in view the old law, the evil, and the remedy: *Barrett v. Pulliam*, 77 Ga. 552; and the meaning and intent of the law-makers must be ascertained by the words they used in framing the statute: *Steere v. Brownell*, 124 Ill. 27; and though words cannot be added to or taken from a statute to make plain its meaning, grammatical errors should not vitiate it, and words may be transposed when a clause is meaningless as it stands: *Barrett v. Pulliam*, 77 Ga. 552. To ascertain the intention of the law-makers, all sections of a statute and all statutes upon the same subject must be construed together: *State v. Harrison*, 116 Ind. 300. The intent of the law-makers must, so far as is reasonable and possible, harmonize with the constitution: *Ex parte Murphy*, 27 Tex. App. 492. Where a statute would operate unjustly, or where absurd consequences would result from a literal interpretation of the terms and words used, the intention of the law-makers, if it can be ascertained, must prevail: *Murray v. Hobson*, 10 Col. 66.

The Words in Statutes, Given What Meaning. — The general rule is, that the words are given the meaning according to their common and popular acceptation and import: *Henry v. Evans*, 97 Mo. 47; *Steere v. Brownell*, 124 Ill. 27; *State v. Berard*, 40 La. Ann. 172.

Miscellaneous Rules as to Construction. — Where a statute is susceptible of two constructions, and both are equally reasonable, one of which will render the statute void, and the other valid, courts must adopt the construction which does not vitiate the statute: *People v. Terry*, 108 N. Y. 1. Proceedings of a constitutional convention may be referred to to ascertain the meaning of a clause in the constitution: *Smisson v. State*, 71 Tex. 222. So in placing a construction on one section of the constitution, another section of

the constitution may be referred to bearing upon the same subject, and from the two the true intent of the framers ascertained: *Reed v. People*, 125 Ill. 592. When a statute is referred to by general descriptive particulars, some false and others true, the false may be rejected as surplusage, provided the remainder are sufficient to show clearly what is meant: *Murray v. Hobson*, 10 Cal. 66.

RANDALL v. VAN WAGENEN.

[115 NEW YORK, 527.]

AN ATTORNEY ACQUIRES NO LIEN ON A CAUSE OF ACTION BY COMMENCING SUIT THEREON. His lien does not exist until after judgment is obtained. **PARTIES, WITHOUT CONSENT OF THE ATTORNEY, MAY SETTLE AND DISCONTINUE A SUIT BEFORE JUDGMENT,** because, prior to judgment, the attorney has no lien, and the only remedy is against his client for compensation. If, however, a settlement is made collusively, for the purpose of defrauding the attorney out of his costs, the court may interpose for his protection by permitting him to proceed with the suit, and to recover, if the facts permit it, to the extent of his costs in the action.

AN ATTORNEY CANNOT, ON THE COMPROMISE OF A SUIT WITHOUT HIS CONSENT, maintain an independent action against the defendant in such suit on a claim that by a fraudulent and collusive settlement such defendant has prevented the attorney from prosecuting the former action to judgment, and thereby obtaining the fruits of an agreement between the attorney and the plaintiff, by the terms of which the attorney was entitled to one half of any sum recovered, and to repay himself out of the other one half for advances made by him to the plaintiff.

E. Countryman, for the appellant.

Charles M. Marsh, for the respondent.

ANDREWS, J. The suit of O'Neil and others against the defendant Van Wagenen was settled and discontinued in 1877 by agreement between the parties, without the consent of the attorney for the plaintiffs. The attorney subsequently brought this action against the parties to the former action, alleging the existence of a cause of action on contract in favor of the plaintiffs in the former action against the defendant therein for \$10,799.35; the bringing of an action thereon by him as attorney for the plaintiffs; an agreement between the plaintiffs in that action and their attorney to give him one half interest in the claim and in any recovery as compensation for his services, and an ownership therein to that amount for such compensation, and a further agreement that the attorney should hold the entire claim as collateral security for his compensation, and for other indebtedness owing by the plaintiffs to the attorney, and that the plaintiffs made a parol assign-

ment to the attorney of the entire claim for these purposes. The complaint further alleges that the defendant Van Wageningen had notice, in 1875, of the said agreement, and that the parties to the action fraudulently and collusively, and without the knowledge or consent of the attorney, settled and discontinued the action to cheat and defraud the attorney of his interest and rights under the agreement. It is alleged that the claim was good and collectible, and that the attorney, by reason of such fraud, has lost the one half interest in the claim, and also the sum of \$2,350 owing by the O'Neils to him for professional services in other matters and proceedings, and the plaintiff demands judgment against the defendants for \$10,000.

The complaint was dismissed, and we think properly. So far as the claim of the plaintiff is founded upon the lien which the law gives attorneys for their services, there is no foundation for the action. By the common law, an attorney, by commencing a suit, acquires no lien on the cause of action. The lien only arises after judgment, and is a right to have the judgment held for the debt, together with any security for the judgment, such as bail, until the lien is discharged, and, to the extent of the lien, payment by the defendant in the judgment to the plaintiff, after notice, to the prejudice of the attorney, will be no discharge: *Pulver v. Harris*, 52 N. Y. 73; *Platt v. Jerome*, 19 How. 384; *Martin v. Hawks*, 15 Johns. 405; *People ex rel. Manning v. N. Y. C. P.*, 13 Wend. 652; 28 Am. Dec. 495. From the principle that there is no lien until judgment, it follows that it is competent for the parties, acting *bona fide*, to settle and discontinue a suit before judgment, without the consent of the attorney; and he is remitted to his remedy against his client for his compensation: *Pulver v. Harris*, *supra*, and cases cited. But where such settlement is made collusively, for the purpose of defrauding the attorney out of his costs, courts have been accustomed to intervene, and to protect the attorney by permitting him to proceed with the suit; and if he is able to establish a right to recover on the cause of action as it originally stood, to permit such recovery, to the extent of his costs, in the action: *Coughlin v. New York Central etc. R. R. Co.*, 71 N. Y. 443; 27 Am. Rep. 75, and cases cited. And the court will set aside an order of discontinuance, if it stands in the way. This is an adequate remedy, and, we think, the exclusive remedy, where the suit has been fraudulently settled by the parties before judgment, to cheat the attorney out of his costs. We have found no case of an

equitable action to enforce the inchoate right of an attorney under such circumstances, and no such precedent ought, we think, to be established: *Goodrich v. McDonald*, 112 N. Y. 164; *Talcott v. Bronson*, 4 Paige, 502; *Tullis v. Bushnell*, 65 How. 465. This disposes of the action so far as it seeks to enforce, by means of an independent and original suit, the equitable right of the plaintiff, sought to be defeated by the alleged fraudulent and collusive settlement.

The only other aspect of the action which gives it any color of foundation is presented by the allegation of an actual transfer to and ownership by the plaintiff of the cause of action embraced in the original litigation, of which the defendant, Van Wagenen, is alleged to have had notice, and which is to be assumed, as the case stands. It is claimed that the action may be maintained as one brought by the plaintiff as assignee of the original debt owing by the O'Neils to Van Wagenen. It would probably be a sufficient answer to this position, that such a construction of the complaint was not, so far as appears, claimed on the trial. But a more satisfactory answer is, that such was not, in fact, the nature of the action. There is no contract between the O'Neils and Van Wagenen set out in the complaint. It alleges, by way of inducement merely, that the O'Neils had a claim or demand against Van Wagenen on contract, amounting to \$10,799.35; but what the contract was, whether the claim was for work, labor, or services, or for money had or received, or goods sold, or upon what consideration the claim was founded, is not intimated. The pleader evidently commenced his action on the theory that his cause of action was *ex delicto*, the *gravamen* being the fraudulent and collusive settlement by which he was prevented from prosecuting the action to judgment, and thereby obtaining the fruit of his agreement with the O'Neils. Assuming that, after the discontinuance of the original action, Randall could have brought a suit, as assignee, on the contract between the O'Neils and Van Wagenen, this was not such an action; and the plaintiff is not entitled to any strained construction of his pleading to relieve him from a position in which he intentionally placed himself.

The judgment is right, and it should, therefore, be affirmed.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN, ITS NATURE AND EXTENT: *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567, and note 578. Attorney's lien is not affected by a fraudulent settlement out of court: *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258, and see note 261.

LIEN OF ATTORNEY UPON JUDGMENT RECOVERED BY HIM is governed by the law of the state where the judgment was recovered and the lien attached, and not by the law of the state where the judgment is sought to be collected: *Citizens' Nat. Bank v. Cutler*, 54 N. H. 327; 20 Am. Rep. 134.

ATTORNEY'S LIEN ON JUDGMENT DOES NOT AUTHORIZE HIM to bring suit thereon in his client's name without his authority: *Horton v. Champlin*, 12 R. I. 550; 34 Am. Rep. 722.

ATTORNEY AND CLIENT — ATTORNEY'S LIENS. — This lien attaches to the ultimate recovery of the client, and not to any mere incidental recovery; so that when plaintiff recovers realty upon condition that he pay a certain sum of money to defendant, the attorney's lien will attach only to the surplus remaining after such sum has been paid out of the land: *Blackburn v. Clarke*, 85 Tenn. 506. Where an attorney has procured a will to be set aside, whereby his client becomes entitled to a share in the decedent's estate, he has an equitable lien upon such share for his fees, and has priority over a judgment creditor of his client whose judgment lien attached subsequently to the contract for legal services between the attorney and client: *Justice v. Justice*, 115 Ind. 201. An attorney has a lien for a general balance of compensation upon his client's money which is in his hands: *Van Etten v. State*, 24 Neb. 734. But an attorney cannot be allowed an attorney fee in a proceeding by himself to enforce an attorney's lien under the statutes of Florida: *McCarthy v. Havis*, 23 Fla. 508. And where an attorney's lien is asserted to the prejudice of other creditors, the facts must appear as to the nature and extent of the recovery by the attorney for his client: *Martin v. Kennedy*, 83 Ky. 335. After money recovered by an attorney has been paid with his consent to his client, he has no lien either upon the money or upon property purchased therewith: *Goodrich v. McDonald*, 112 N. Y. 157.

PIERSON v. CROOKS.

[115 NEW YORK, 539.]

VENDOR WHO ACCEPTS ARTICLES OF INFERIOR QUALITY tendered to him, as in fulfillment of an executory contract of sale, is, in the absence of fraud, deemed to assent that they are of the quality to which he is entitled under the contract, and he is precluded from subsequently urging their inferiority. This rule of law imposes on a vendee the duty of inspection before acceptance, if he desires to save his rights, in case the goods are of inferior quality. He cannot reject the goods after acceptance, nor recover damages for their inferior quality.

RECEIPT OF GOODS IS ONE THING, AND ACCEPTANCE ANOTHER; receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything is done by the buyer which he would have no right to do unless he were the owner of the goods.

RIGHT OF VENDOR TO REJECT GOODS, WITHIN WHAT TIME MAY BE EXERCISED. — Where goods are ordered of a certain quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and the carrier is not the agent of the vendee to accept the goods as corre-

spending with the contract, although he may be his agent to receive and transport them.

DELIVERY OF GOODS TO A CARRIER UNDER AN EXECUTORY CONTRACT OF SALE vests title in the vendee, if they correspond with the contract; but the rule is otherwise where the goods do not so correspond.

CARRIER IS NOT THE AGENT OF THE VENDEE to accept goods, unless specially authorized.

PURCHASER'S DUTY IS TO ACT PROMPTLY IN MAKING AN EXAMINATION OF GOODS SENT UPON HIS ORDER, to see whether they comply therewith, and to give prompt notice to the vendor of their rejection, if defective. But the vendee has a reasonable time for inspection and to give notice; and this reasonable time is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury of the vendor from delay, as convenience and necessity of the vendee. A delay on the part of the vendee to examine goods shipped to him for ten days after their arrival, and the further delay of some length of time to give notice of their rejection, cannot be said, as a matter of law, to be unreasonable.

PURCHASER OF GOODS UNDER AN EXECUTORY CONTRACT, WHERE PAYMENT AND ACCEPTANCE ARE BY THE CONTRACT concurrent obligation, cannot, on the delivery of the goods, pay the purchase-money, and subsequently rescind the acceptance and reject the goods for defects ascertainable on examination.

PAYMENT MADE UNDER EXECUTORY CONTRACT OF SALE WILL NOT PRECLUDE THE VENDEE FROM SUBSEQUENTLY REJECTING GOODS for want of compliance with the contract, if it provided that payment should be made in advance before the delivery or acceptance of the goods.

VENDEE MAY RECOVER MONIES PAID TO HIS VENDOR UNDER EXECUTORY CONTRACT OF SALE, and also moneys paid for duties on goods shipped under such contract, where it was necessary to pay such duties to obtain possession of and to properly examine the goods, and such payments were due on the delivery to the vendee of the shipping contract, and such goods, on examination, are found not to conform to the contract, and are seasonably rejected on that account.

CONTRACT IS NOT ENTIRE AND INDIVISIBLE BECAUSE EMBRACED IN ONE INSTRUMENT, if it provides for the sale and purchase of different kinds of articles, and the prices are different and specific for each kind. Hence, where one class of articles were shipped to the vendee, which he accepted, this will not preclude him from rejecting a later shipment of another class on the ground that it did not comply with the contract of purchase.

John L. Hill, for the appellants.

James C. Carter, for the respondents.

George A. Black, for the respondents.

ANDREWS, J. The contract was between the plaintiffs, importers and dealers in iron in the city of New York, and the defendants, engaged at Liverpool, England, in the business of buying and selling iron manufactured by other persons, and

having an agency in the city of New York. The contract was in writing, entered into in the city of New York, for the future delivery by the defendants to the plaintiffs of two descriptions of iron,—hoops and sheets,—the quantity, quality, and price of each description being specified. The iron was not then in existence, or if in existence, was not identified, and it was contemplated that it was to be thereafter manufactured according to specifications to be furnished by the plaintiffs. The words “immediate specification” related primarily to the sizes and gauges of the iron. The plaintiffs, however, in their specifications, directed that the iron of each description should be sent forward in three or four separate shipments, and that shipping documents should be sent with each shipment, and the defendants acceded to this direction. By the contract, the defendants were to deliver the iron “free on board” at Liverpool, and the plaintiffs were to pay for it by bills of exchange, at sixty days, on delivery to them of the shipping documents in New York. The words are, “payment by 60 d / St. Bl. Exchange against shipping documents here.” The quality of the hoops is stated in the contract as “W I W or equal,” and of the sheets, one hundred tons, “W I W or equal,” and fifty tons “R G.” The letters used designate brands of iron well known to the market. The iron shipped was none of it “W I W” iron. It is conceded on both sides that the contract was executory, and that the rights of the parties are governed by the rules which apply to a contract to sell and deliver in the future a commodity to be procured by the vendors, as distinguished from a sale *in præsenti* of specific, identified, and existing merchandise.

The main controversy relates to the claim of the plaintiffs to recover back duties and expenses, etc., paid by them in New York on the hoops shipped by the defendants at Liverpool, amounting to \$2,501.69, and the further sum of \$3,229.78 paid on the contract for the purchase of the hoops. The claim is put on the ground that the quality of the hoops did not correspond with the contract, and were greatly inferior and unmerchantable, and were rejected for that reason by the plaintiffs. The fact that the hoops were of inferior quality is not now controverted. The referee so found, and also that they were so defective as to be unmerchantable. The defendants did not seek to review this finding at the general term, and, instead of incorporating into the case the evidence on the subject, they inserted a statement that they do not question, on

the appeal, the finding of the referee, or that the actual quality of the hoops was not equal to "W I W" iron.

The defendants, while admitting the inferior quality of the iron, resist the recovery had by the plaintiffs, on the grounds,— 1. That they delivered the iron "on board" steamers at Liverpool, according to their contract, and that the plaintiffs were bound then and there to inspect the iron and ascertain its quality, and reject it if it was not according to contract, but not having done so, this was, in law, an acceptance at Liverpool, which precluded them from subsequently questioning the quality or rejecting the iron; 2. That if the right of inspection and rejection might have been exercised after the iron reached New York, the plaintiffs did not act with sufficient promptness, and lost the right by delay, and also, that by paying for the iron after it reached New York, they concluded themselves from subsequently asserting that there had been no acceptance, the act of payment being, as is insisted, wholly inconsistent with such claim; 3. That the contract was entire and indivisible, and that the plaintiffs, having accepted and paid for the sheets, could not reject the hoops.

There is no dispute as to the rule of law touching the rights of parties under an executory contract for the future sale and delivery of goods of a specified quality, in the absence of express warranty. The quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. If he tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud, deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality. There is in such case no warranty of quality which survives acceptance, and the vendee cannot reject the goods after acceptance or recover damages for inferior quality. He can do nothing inconsistent with the right of rejection, or do what is only consistent with acceptance and ownership, without precluding himself. The mere use of an article on trial may in some cases be contemplated by the parties as a means by which the vendee is to ascertain whether it corresponds in quality with the article agreed to be furnished. In such cases mere use is not inconsistent with a subsisting right to reject for cause, and will not constitute an

acceptance. The general rule is stated in Benjamin on Sales. In section 701 the author says: "The buyer is entitled before acceptance to a full opportunity of inspecting the goods, to see if they correspond with the contract"; and in section 706: "Where goods are sent to the buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them. For receipt is one thing, and acceptance another; but receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything be done by the buyer which he would have no right to do unless he were the owner of the goods." The rule governing executory contracts of sale has been frequently considered in this state, and applied under various circumstances: *Sprague v. Blake*, 20 Wend. 64; *Reed v. Randall*, 29 N. Y. 361; 86 Am. Dec. 305; *Gurney v. Atlantic etc. R. R. Co.*, 58 N. Y. 358.

The contention that the iron was delivered and accepted at Liverpool proceeds on the assumption that objection to quality should have been made at the point of shipment, and could not be taken after the iron arrived at New York. It is manifest that the right of inspection to ascertain whether the iron furnished corresponded in quality with the contract was of prime importance to the vendees. The quality of the iron was a most material consideration, and neither party could have contemplated that the vendees were bound to accept iron defective in quality. When and at what place the right of inspection was to be exercised was not definitely fixed by the contract. The intention of the parties, when ascertained, is to govern. They might have provided that the inspection should be made either at Liverpool or at New York. The contract is silent on this point, and the defendants insist that, in the absence of express words, the law ascertains and fixes the intention that examination should be made at the place where the defendants were to deliver the iron, to wit, at Liverpool. We are, however, of opinion that where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them. The defendants un-

dertook to deliver iron of a specific quality on board steamers at Liverpool, to be sent to the purchasers at New York. This contract was not performed by delivering iron of inferior quality. They knew, or were bound to know, that the iron delivered was defective. They selected and purchased the iron, and it was within their power, and it was their duty, to supply iron of the proper grade. If they sent forward iron of inferior grade, they justly should bear the consequences, and sustain any loss entailed by the non-performance of their contract, unless they guarded themselves by imposing upon the plaintiffs the duty of acceptance or rejection at the port of shipment. It is said that on the delivery of the iron on ship-board at Liverpool, the title vested in the plaintiffs, and that the vesting of the title in the vendees implies an acceptance, and is inconsistent with the alleged right of inspection and rejection on its arrival in New York. There can be no doubt that on delivery to the carrier of iron corresponding with the contract, the title would immediately vest in the purchasers, and the iron would thereafter be at their risk. Nor is there any doubt of the general rule that delivery of goods corresponding with the contract is a condition precedent to the vesting of the title in the vendee: *Reed v. Randall, supra*. But assuming that the title to the iron for some purposes vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York. The circumstances strongly confirm the view that the parties did not contemplate that the right of inspection should be exercised at Liverpool. The contract was made in New York, and the plaintiffs had no agent in Liverpool. The defendants shipped the iron on steamers selected by themselves. They gave the plaintiffs no notice in advance of the times of shipment, or by what steamers the shipments would be made, or at least no notice in time to enable the plaintiffs to exercise the right of inspection at Liverpool. The plaintiffs, after arrival of the first shipment by the Germanic, rejected the hoops on board for defect in quality, and the defendants' agent in New York, while not assenting to the fact that they were inferior, said they would consider and examine into it, but made no claim that the objection came too late. The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial

transactions. It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to purchasers, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered.

A similar question was considered in the case of *Pope v. Allis*, 115 U. S. 363, and it was there held that the mere delivery of goods under an executory contract by the vendor to the carrier appointed by the vendee did not necessarily bind the latter to accept them, and that on arrival the purchaser has the right of inspection and rejection if they did not conform to the contract. It is the settled rule that a carrier, unless specially authorized, is not the agent of a vendee to accept goods so as to validate a verbal contract under the statute of frauds: *Blackburn on Sales*, 22; *Allard v. Greasert*, 61 N. Y. 1, and cases cited. I do not perceive that the agency should be considered more extensive in the case of goods delivered under an executory contract, where no question of the statute arises. An examination by carriers of the quality of the goods would be, in most cases, impracticable. The first ground upon which the defendants sought to defeat the action cannot, we think, be supported, and we are of opinion that the plaintiffs had the right of inspection and rejection for defect in quality after the iron arrived in New York.

The objection that the plaintiffs waived the right to reject the iron for defective quality by their delay in inspecting and rejecting it after it reached New York was urged on the trial, and the referee found, although with "some degree of hesitation," that, under all the circumstances, there was no unreasonable delay in the examination by the plaintiffs after its arrival. The steamer *Germanic*, with hoops and sheets, arrived April 5, 1880; the *Arizona*, April 12th; the *Chester*, with hoops only, April 20th. It required from three to five days to discharge cargo, and ten days was the usual time allowed for removing goods from the dock. The hoops which came by the *Germanic* were removed by the plaintiffs from the dock to their warehouse on or before the fifteenth day of April, when they examined them for the first time, and promptly notified the agents of the defendants of their objections, and requested their removal. They were not taken away by the defendants, and on April 22d, the plaintiffs stored them in a general warehouse, subject to the order of the defendants, and delivered to them the storage receipts. The hoops by the *Arizona* and by

the Chester remained on the dock, without examination by the plaintiffs, from the time of arrival and unloading of these vessels until the 26th and 27th of April, when the plaintiffs examined them, and finding them defective, on the 29th of April they notified the defendants of their objections, and on or before the 1st of May stored them in a warehouse for account of the defendants, and on the 8th of May gave the defendants formal notice that they rejected the hoops and that they were stored, and on the 11th of May tendered the storage receipts. The referee found that examination of the hoops by the Arizona was possible at any time after the 16th of April, and of the Chester hoops any time after April 20th, and that the postponement of examination was attributable to reasons of business necessity or convenience of the plaintiffs. It was shown that it was not the custom in New York for purchasers to examine goods coming by sea upon the dock, but to postpone examination until they were removed to their stores. It is the duty of a purchaser to act promptly in making an examination of goods sent upon his order to see whether they comply therewith, and to give prompt notice to the vendor of their rejection, if found defective, if he intends to avail himself of that remedy. It was said by Lord Ellenborough in *Fisher v. Samuda*, 1 Camp. 190, that "it was the duty of a purchaser of any commodity, immediately on discovering that it was not according to order, and unfit for the purpose intended, to return it to his vendor, or give him notice to take it back."

Similar language was used by the same judge in *Hopkins v. Appleby*, 1 Stark. 388; and in *Sprague v. Blake* and *Reed v. Randall*, *supra*, the doctrine stated by Lord Ellenborough was quoted with approval. Indeed, it stands upon the most obvious justice and equity that the seller should be apprised promptly if there is any objection, and the vendee intends to reject the goods, so that he may retake possession or resell the goods, and save himself as far as practicable from loss. But the vendee has a reasonable time for examination and to give notice, and what is a reasonable time is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the vendor from delay as the convenience and necessities of the vendee. In *Fisher v. Samuda*, *supra*, there was an interval of six months between the discovery of the defect and notice to the vendor. In *Hopkins v. Appleby*, *supra*, the vendee used the article purchased, after discovering the

defect, until it was wholly consumed, and then for the first time notified the vendor of the defective quality. In *Reed v. Randall*, *supra*, the tobacco was delivered to the vendee in April, and the first notice to the vendor of any defect was in September of the next year. The delay in the examination of the hoops which came by the Germanic for five or six days after they were unloaded, and of ten days in the case of the Arizona, and a less number in the case of the Chester, and the subsequent delay, until the 8th of May, to give notice of the rejection of the hoops which came by the two last-named vessels, was not so great that the court can say, as matter of law, that it was unreasonable, and we are concluded by the finding of the referee from re-examining the question of fact. The authorities are uniform upon the point that the question of reasonable time in such cases is generally one of fact, and not of law: *Doane v. Dunham*, 79 Ill. 131; *Boothby v. Scales*, 27 Wis. 626; *Hickman v. Shimp*, 109 Pa. St. 16; *Stone v. Browning*, 68 N. Y. 604; Benjamin on Sales, 904.

The plaintiffs, after the arrival of the hoops, made two payments to defendants, April 19th and April 24th. The payment of April 24th included the purchase price of the hoops which came by the Arizona and Chester. The duties were paid on the landing of the goods. The sums paid for duties and for the hoops are those which the plaintiff sought to recover back in this action. The defendants insist that those payments, made after the arrival of the goods, conclude the plaintiffs from denying an acceptance. The payments, it is claimed, were a conclusive recognition by the plaintiffs of their ownership of the goods and their obligation to pay for them, and further, that the payment of April 24th having been made on the demand of the defendants under a claim of right, it was voluntary, and cannot be recovered back. The purchaser of goods under an executory contract, where payment and acceptance are, by the contract, concurrent and dependent obligations, cannot, on delivery of the goods, pay the purchase-money, and subsequently rescind the contract and reject the goods for defects ascertainable on examination. It would be inconsistent with the nature of the transaction and the admission which the payment implies to permit him to do so, in the absence of fraud or deceit on the part of the vendor: *Brown v. Foster*, 108 N. Y. 387. In such case the purchaser must satisfy himself, before making payment, that the goods tendered correspond with the contract. But the

contract may provide that payment shall be made in advance before delivery or acceptance of the goods. There is nothing in such a stipulation inconsistent with an executory contract, nor would payment under such a contract preclude the purchaser, when delivery is tendered, from the right of examination, or from exercising the right of rejection, if the goods did not conform to the contract: *Pope v. Allis*, 115 U. S. 363; *Coplay Iron Co. v. Pope*, 108 N. Y. 232. The duties, under the rules of the customs, were paid, and were required to be paid before the plaintiffs took possession, and as a condition of their exercising any control of the property. The event upon which the plaintiffs were bound to pay for the iron was specified in the contract, and that was on the delivery to them of the shipping documents. This might, and in the ordinary course would, precede the actual delivery and receipt of the goods into their custody. There would be nothing necessarily inconsistent in making a payment on presentation of the shipping documents and a subsequent rejection of the iron on examination. It would be analogous to a payment in advance of delivery. The defendants had a right to demand payment on delivery of the shipping documents, although the plaintiffs had had no opportunity to inspect the iron.

It appears that after the plaintiffs had examined and rejected the hoops which came by the *Germanic*, they desired to defer paying for the hoops which came by the *Arizona* and *Chester* until examination. The correspondence between the parties indicates that at first the defendants were disposed to accede to this view. But on the 23d of April, before the plaintiffs had examined the iron, the defendants, insisting that the iron was according to contract, peremptorily demanded payment of the plaintiffs, and threatened litigation unless the plaintiffs remitted the amount of the account before noon of the next day, and in pursuance of this demand the plaintiffs made the payment of April 24th, stating in the letter containing the remittance that "we reserve the right to reject the poor iron when we take in store." The plaintiffs, in making this payment, simply complied with their legal obligation under the contract. They had received the shipping documents, although they had as yet made no examination of the iron which was then on the dock. Unless they had already lost the right of examination and rejection by their prior delay, they did not lose it by performing their stipulation in the contract to pay on presentation of the shipping documents.

That obligation was not dependent upon acceptance of the goods. The doctrine of voluntary payment is inapplicable to the case. That doctrine proceeds upon the just rule that a person cannot yield to an asserted right and pay a sum of money demanded on account of such right, and afterwards maintain an action to recover it back on the ground that he was not legally bound to do the thing demanded, nor will it aid him that in making the payment he reserves a right to recall it, or pays under protest, there being no fraud or deceit: *Flower v. Lance*, 59 N. Y. 604. The plaintiffs here do not deny, but, on the contrary, admit, the right of the defendants to demand the money paid at the time it was paid. They base their action on the ground that not having then accepted the iron, and the right of rejection still existing, and having thereafter rejected it for cause, the consideration upon which they paid the money failed, and they are entitled to recover it back. We think the claim is well founded. The answer to the point of voluntary payment may be technical, but the defendants stand in the attitude of urging a strict and technical defense.

The point that the contract was entire and indivisible, and that the plaintiffs could not accept the sheets and reject the hoops, is based upon the general rule of law that where a contract is entire, though it may embrace the performance of several things, if one of the parties professes to deny its obligation upon him, or to rescind it on the ground that the other party has failed to perform its obligation on his part, he must renounce or rescind it *in toto*. There was, indeed, one contract in the sense that there was but one instrument embracing both descriptions of iron. But the two kinds of iron were distinct in character, and the prices were different and specific for each kind. There is nothing upon the face of the contract or in the evidence to indicate that the price of one kind was fixed with reference to the price of the other, or that the acceptance of both kinds was a consideration for the undertaking by the defendants to deliver iron of either kind. The shipments were severed by the acts of the parties. The payments were to be made on the arrival of each shipment. The plaintiffs directed that the sheets should be sent in three shipments, and the hoops in three or four. If only sheets had been included in one shipment, it would have answered the contract, and so of the hoops. The acts of the parties indicate that they regarded the contract as several in respect to each

description of iron. The plaintiffs paid for the sheets by the Germanic, and declined to pay for the hoops, and the defendants made no claim that, having received the sheets, the plaintiffs could not reject the hoops. Indeed, the mere failure of the defendants to send hoops of the required quality by the Germanic was not *ipso facto* a breach of their contract. They had a right to supply others in their place, and if the sheets conformed to the contract, the plaintiffs were bound to pay for them, although the hoops were defective. Whether the contract was entire in the sense claimed depends upon the intention. We think, under the circumstances, it was properly held to be divisible, and that acceptance of sheets did not preclude the plaintiffs from rejecting hoops.

The construction of the defendants, growing out of the shipment of sheets by the Rhubina, was, we think, properly disposed of by the general term, and nothing need be added to the opinion there upon this point. The point is covered also by *Filley v. Pope*, 115 U. S. 215.

The counterclaim based on the shipment of hoops by the Abyssinia, which the plaintiff refused to accept, was properly overruled on two grounds: 1. Because the failure of the defendants to furnish hoops of the required quality in the former shipments, and insisting that the plaintiffs should accept them on the contract, justified the plaintiffs in rescinding the contract as to the balance of the hoops; and 2. The defendants, who are seeking to compel the plaintiffs to pay for hoops by the Abyssinia, have not only failed to show that they were of the quality provided in the contract, but they inserted in the case a statement that they would not insist on the appeal that the iron was equal to that agreed to be delivered.

We think the judgment is right, and it should, therefore, be affirmed.

SALES. — GOODS ARE NOT ACCEPTED SO AS TO WAIVE THE PURCHASER'S RIGHT to object that they are not of the quality called for by his contract, merely by the receipt and retention of part of them by the purchaser, when he at the same time objects thereto, and stipulates that such receipt shall not be regarded as an acceptance: *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199, and see note 206.

SALES. — IN CONTRACT OF PURCHASE BE SILENT AS TO PERSON OR MODE BY WHICH GOODS ARE TO BE SENT, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee: *Magruder v. Gage*, 33 Md. 344; 3 Am. Rep. 177; *Kruller v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402; *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721; compare *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545; *Lloyd v. Wright*, 20 Ga. 574; 65 Am. Dec. 636.

SALES. — PROPERTY IN GOODS OF DIFFERENT QUALITY FROM THOSE ORDERED DOES NOT VEST IN PURCHASER until he accepts them, with a knowledge of their quality, or after he has a reasonable opportunity of determining their quality, and the question of acceptance is one for the jury: *Diversy v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154, and see note 159.

CONTRACTS — RESCISSION OF: *Collyer v. Moulton*, 9 R. L. 90; 98 Am. Dec. 370; *King v. Mason*, 42 Ill. 223; 89 Am. Dec. 426; *Babcock v. Case*, 61 Pa. St. 427; 100 Am. Dec. 654; *Ware v. Houghton*, 41 Miss. 370; 93 Am. Dec. 258; *Wilbur v. Flood*, 16 Mich. 40; 98 Am. Dec. 203; *Davis v. Calloway*, 30 Ind. 112; 95 Am. Dec. 671.

SALES — RESCISSION, ETC. — If, after a sale and delivery of goods to a vendee, the vendor refuses to rescind, and the goods are levied upon in the possession of the vendee at the instance of his creditors, the vendor cannot assert title by way of an interpleader: *Freedman v. Morrow S. Mfg. Co.*, 122 Pa. St. 25. An offer to rescind by the purchaser, not accepted, or a declaration to the seller's agent, before receiving the goods, that he did not want them, to which no reply was made, does not amount to a rescission, nor impair the purchaser's title: *Robinson v. Pogue*, 86 Ala. 257. An express stipulation by a seller that in case of a breach of warranty on his part he would restore the purchase price, being made for his own benefit, is waived, unless claimed when the purchaser makes an offer to rescind: *Thompson v. Harvey*, 86 Id. 519. Where, after discovery of, or an opportunity to discover, any defect in goods delivered under an executory contract of sale, the buyer does not return, nor offer to return, the property, nor give the seller notice or opportunity to take the goods back, in absence of a warranty as to quality, the buyer is conclusively presumed to have acquiesced, and cannot afterwards complain of the inferior quality of the goods: *Coplay Iron Co. v. Pope*, 108 N. Y. 232. So a vendee may waive objections as to quality of goods by accepting them, knowing their inferior quality: *Smith v. New Albany R. M. Co.*, 50 Ark. 31. A purchaser may rescind, and refuse to pay the contract price, where the seller refused, as per agreement, to pay certain storage charges that were against the goods: *Malone v. Minnesota Stone Co.*, 36 Minn. 325.

SALES — MEANING OF "MERCHANTABLE CATTLE." — The words "good and merchantable cattle," in a contract of sale and delivery, mean cattle good not only for ordinary purposes of sale, but good in fact, and they must not be infected with any latent disease, although such disease may be unknown to both parties: *San Antonio v. Strumberg*, 70 Tex. 366.

SALES OF MACHINERY. — The purchase of a machine from a dealer implies that the machine sold shall be a new one, and not a second-hand one, or one worse for wear: *Grieb v. Cole*, 60 Mich. 397. It is ordinarily the custom to require one who purchases an article of farm machinery to give notice of any defect therein to the manufacturers; but under some circumstances this right may be waived by the dealer who sells the machinery, so that the right of action accrues in favor of the purchaser for a failure of the machine to work correctly, without his first giving notice thereof to the manufacturers: *Acker v. Kimmie*, 37 Kan. 276. A machine cannot properly be said to be delivered until set up as a machine, for the several parts, which only an expert could put together, could not properly be called a machine until attached together, and formed into one complete machine: *Wood etc. Co. v. Gaertner*, 63 Mich. 520. A purchaser may, upon discovering that a machine will not work properly, and before he has executed his part of the contract of purchase, return the machine, and thereby release himself from the contract of sale: *Davis v. Sweeney*, 75 Iowa, 45. Delivery of a machine into the hands of a carrier is

not a waiver of the vendor's right to retake the same upon vendee's refusal to carry out his agreement: *Pond etc. Co. v. Robinson*, 38 Minn. 272. Where, under a contract of sale of a machine, the purchaser was entitled to a return of his purchase-money notes if the machine was returned because of a failure to work properly, a refusal of the company or its selling agent to accept the returned machine will not defeat the purchaser's right to his notes: *Osborn etc. Co. v. Howard*, 37 Kan. 413.

MOORE v. WILLIAMS.

[115 NEW YORK, 533.]

AGREEMENT TO MAKE A GOOD TITLE IS ALWAYS IMPLIED in executory contracts for the sale of land, and the purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title knowing its defects. His right to an indisputable title does not depend on the agreement of the parties, but is given by law.

A GOOD TITLE MEANS not merely a title valid in fact, but a marketable title which can be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for the loan of money.

PURCHASER WILL NOT GENERALLY BE COMPELLED TO TAKE A TITLE WHEN THERE IS A DEFECT IN THE RECORD TITLE which can be cured only by resort to parol evidence, or when there is an apparent encumbrance which can be removed or defeated only by such evidence.

DISTINCTION BETWEEN GOOD AND MARKETABLE TITLE IS NOT CONFINED TO COURTS OF EQUITY, BUT IS ALSO RECOGNIZED AT LAW, especially if the question concerning title is one of fact, as where the validity of the title or its freedom from an apparent encumbrance can be established only by parol evidence.

AN ACTION IS MAINTAINABLE BY A VENDEE AGAINST A VENDOR TO RECOVER MONIES PAID TO THE LATTER UNDER AN EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE, and for expenses of examining the title to such real estate, if it appears that the property contracted to be sold is apparently subject to a judgment lien, and its exemption from such lien can be shown only by parol evidence of witnesses.

George Zabriskie, for the appellant.

Maurice S. Cohen, for the respondent.

EARL, J. The defendants, describing themselves as trustees, on the eighth day of December, 1884, entered into a written contract with the plaintiff to sell to him a lot of land known as No. 247 Fulton Street, in the city of Brooklyn, for the sum of \$25,000. The plaintiff, at the time of executing the contract, paid upon the purchase price the sum of \$250, and he was to pay \$2,250 more upon execution and delivery to him of the deed on the fifteenth day of January, 1885; and he was to take the lot subject to a mortgage thereon for \$22,500. The defendants agreed to give him a proper deed of bargain

and sale for the conveyance, and assuring to him the fee-simple of the lot subject to the encumbrance of the mortgage. The plaintiff subsequently refused to complete his purchase, on the ground that the title tendered to him by the defendants was not clear and perfect, such as he was entitled to receive under the contract, and he commenced this action to recover the installment of \$250 paid by him, and \$406.14, the amount paid by him to counsel for examining the title.

The title came to the defendants from William H. Guion by a deed dated August 1, 1884, which recites that the firm of Williams and Guion, in liquidation, is indebted to the estate of John S. Williams, deceased, in the sum of \$105,000, and interest from August 2, 1882, and that Guion and the firm are desirous to provide for the payment thereof; and also contains the following recital: "Whereas the said William H. Guion is seised of the lands and premises hereinafter described in his own name, but in the right of and for the use and benefit of the said firm of Williams and Guion." Then, by apt and appropriate words, the deed conveys the premises in question, with other real estate, to the defendants, in trust, to sell the same and pay the recited indebtedness out of the proceeds. Guion's title to the lot came from Anson B. Moore and George E. Apsley, who conveyed the same to him by a deed dated, acknowledged, and recorded in February, 1883. While the title was thus in Guion, on the second day of February, 1884, Demis Barnes recovered and docketed a judgment against him for \$4,035.14, and that judgment became an apparent lien upon the lot.

The claim of the plaintiff is, that on account of the existence of that judgment the defendants were unable to give him such a title as he had the right to demand, and that, therefore, they could not perform their contract, and that he was entitled to recover the amount of his payment and the expense of examining the title. The defendants claim, and gave evidence tending to establish, that Guion took title to the lot for the firm of Williams and Guion, and paid for the same with firm property, and that the lot, at the time of the recovery of the judgment, although the title thereof stood in the name of Guion, was, in fact, as between him and the firm, the property of the firm; and they therefore contend that the judgment never became a lien on the lot, and that the title tendered to the plaintiff in performance of their contract was in fact perfect.

The defendants attempted to get Barnes to release the lien of his judgment upon the lot, but he refused to do so, and it still remains an apparent lien thereon. There is no record or document which precludes Barnes from enforcing his judgment against the lot. The recitals in the deed of Guion to these defendants do not bind him, and are not evidence against him, a prior encumbrancer. All the evidence to defeat his lien rests in parol, and depends upon the memory of living witnesses. Whenever Barnes attempts to enforce his lien against the lot, he can be defeated only by a resort to the evidence of such witnesses, who may then be dead or inaccessible. He may, at any time within ten years, issue execution upon his judgment and sell the lot, and after the lapse of many years the purchaser at the execution sale may bring an action of ejectment to recover the lot, and the burden would be upon the defendant in that suit to establish by the parol evidence the invalidity of the title of such purchaser.

We will assume that the lot, while the title stood in the name of Guion, actually belonged to the firm of Williams and Guion; that thus the defendants actually had a good title to the lot, and that the judgment was not in fact a lien thereon. But is a purchaser bound to take a title which he can defend only by a resort to parol evidence, which time, death, or some other casualty may place beyond his reach? By the terms of the contract of sale the plaintiff was entitled to a deed conveying and assuring to him the lot in fee-simple; and, by a fair construction of the language used, we think he was entitled to the lot free from any encumbrance except the mortgage specified. The express stipulation that he was to take the lot subject to an encumbrance specified shows that in the minds of the parties there was to be no other encumbrance upon the lot. But aside from the language used in the contract, it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects. His right to an indisputable title, clear of defects and encumbrances, does not depend upon the agreement of the parties, but is given by the law: *Sugden on Vendors*, 13th ed., 14; *Rawle on Covenants*, 430; *Burwell v. Jackson*, 9 N. Y. 535; *Delavan v. Duncan*, 49 Id. 485. Within the meaning of this rule, at least, according to the decisions in this state, a good title means not merely a title valid in fact, but a marketable

title which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence, or when there is an apparent encumbrance which can be removed or defeated only by such evidence; and so far as there are any exceptions to this rule, they are extraordinary cases in which it is very clear that the purchaser can suffer no harm from the defect or encumbrance. In *Swayne v. Lyon*, 67 Pa. St. 436, Sharswood, J., said: "It has been well and wisely settled that under a contract for the sale of real estate, the vendee has the right not merely to have conveyed to him a good title, but an indubitable one. Only such a title is deemed marketable; for otherwise the purchaser may be buying a lawsuit which will be a very severe loss to him, both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable when it exposes the party holding it to litigation." In *Dobbs v. Norcross*, 24 N. J. Eq. 327, it was held that "every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him the land upon which money was invested. He should have a title which should enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

If the plaintiff had been a purchaser at a judicial sale, and this had been a proceeding against him to compel him to take the title, or a proceeding by him to be relieved from his purchase and to have his deposit refunded, it cannot be doubted that the title would have been held so defective or doubtful that the court would have granted him relief: *Jordan v. Poillon*, 77 N. Y. 518; *Fleming v. Burnham*, 100 Id. 1; *Ferry v. Sampson*, 112 Id. 415. If the vendors here had brought an action against the vendee to compel specific performance of this contract, it is equally clear that they would have failed in the action. The court would not compel the vendee to take the title with the cloud of this encumbrance resting thereon: *Marlow v. Smith*, 2 P. Wms. 201; *Sloper v. Fish*, 2 Ves. & B. 149; *Shapland v. Smith*, 1 Brown Ch. 67; *Jeffries v. Jeffries*, 117 Mass. 184; *Seymour v. De Lancey*, Hopk. Ch. 436; 14 Am.

Dec. 552; *Hinckley v. Smith*, 51 N. Y. 21; *Freetly v. Barnhart*, 51 Pa. St. 279; 3 Pomeroy's Eq. Jur., sec. 1405.

But this is an action at law; and it has sometimes been held that the distinction between good and marketable titles is peculiar to courts of equity; that it is unknown in courts of law; and that there the question is simply, Is the title good or bad? The earliest case which has come to our attention, holding such a doctrine, is *Romilly v. James*, 6 Taunt. 274, decided in 1815. That was an action to recover back the deposit paid on a contract for the purchase of lands, upon the alleged insufficiency of the title tendered, and there Gibbs, C. J., said: "It is said that the plaintiff will have made out the claim to recover back his deposit if a cloud is cast on the title. That is not so in a court of law; he must stand by the judgment of the court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity, it might have been otherwise. I know a court of equity often says, this is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take; but the distinction is not known in a court of law." In that case, however, there was no question of fact depending upon parol evidence. The sole question was one of law, whether a devisee took a defeasible fee-simple with an executory devise over, or an estate-tail; and the court held that he took an estate-tail, and that, therefore, the vendor could, as matter of law, make a good title. The vendor clearly had such a title as a court of equity would compel a purchaser to take. In Sugden on Vendors, 13th ed., 832, it is said: "A court of law can, of course, decide upon the validity of a title, however ambiguous or doubtful the construction may appear to be. Whether courts of law were at liberty to follow in the footsteps of equity, and to hold that a title may be too doubtful to be forced on a purchaser, is a question upon which eminent judges have differed with each other, and even with themselves. But it appears to be ultimately settled that courts of law cannot adopt the equitable rule, and are bound to decide the legal question upon which the right to recover must depend." The learned author here evidently had in mind titles depending upon disputed questions of law, which a court of law could certainly and finally solve, but not titles depending upon questions of fact, to be solved by the parol evidence of witnesses, and which, in the

absence of the parties to be bound, could never be said to be finally settled; and he cites, as authority that a purchaser will be entitled to a marketable title at law, *Hartley v. Pehall*, 1 Peake, 131; *Wilde v. Fort*, 4 Taunt. 334; *Curling v. Shuttleworth*, 6 Bing. 121; and as authority that he is entitled at law to only a good title, although not marketable, *Boyman v. Gutch*, 7 Bing. 379; *Oxenden v. Skinner*, 4 Gwil. 1513; *Maberley v. Robins*, 5 Taunt. 625; *Romilly v. James*, 6 Id. 274.

In *Jeakes v. White*, 6 Ex. 873, decided in 1851, the action was brought to recover the expenses incurred by the plaintiffs in investigating the defendant's title to mortgage certain lands, and the plaintiffs recovered. Pollock, C. B., writing the opinion of the court, said: "The question really is, whether this was such a title as a vendee has a right to expect, and which would justify him in concluding the purchase. We think that when a question arises between parties who are about to enter into the relationship of vendor and vendee, as to the meaning of a good or sufficient title, there must be such a title as the court of chancery would adopt as a sufficient ground for compelling specific performance." In *Simmons v. Haseltine*, 5 Com. B., N. S., 555, decided in 1858, after the thirteenth edition of Sugden on Vendors was published, it was held that when the ability of the vendor to make a good title to a purchaser of the premises sold depends upon a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and vendee. There A bought certain premises, the description of which in the particulars included a stall which was claimed by the purchaser of the adjoining house under the same vendor, and it was doubtful, as a matter of fact, whether the description had been corrected, at the time of the sale to A, so as to include the stall, and, as a matter of law, whether the stall was included in the conveyance to the purchaser of the adjoining premises, and a court of equity had refused to decree specific performance against A; and it was held that A was entitled to receive back his deposit and interest, and the expenses of investigating the title, in an action at law against the vendor. So we do not perceive how it can be said that the law has been finally settled in England according to the text of Sugden.

In this state, in *O'Reilly v. King*, 2 Rob. (N. Y.) 587, *Methodist Episcopal Church Home v. Thompson*, 20 Jones & S. 321, *Bayliss v. Stimson*, 21 Id. 225, the New York superior court held

that in an action by a vendee of real estate against the vendor, to recover back a deposit made on account of the purchase price, it was not sufficient for him to show that the title tendered was doubtful, but that he was bound to show that it was in fact bad, and that the doctrine of equity courts as to marketable titles had no application. The latter case was affirmed in this court, not upon the law, however, as announced in the court below, but upon the ground that the objections to the title were baseless. There is also some countenance for the doctrine of the superior court cases cited in the opinion of Folger, J., in *Murray v. Harway*, 56 N. Y. 337. There, however, the learned judge was of opinion that, upon the facts, a court of equity would have adjudged specific performance against the vendee, and it is clear that whenever such is the case the vendee cannot in a court of law rescind the contract and recover back a payment of purchase-money. It has been settled in Pennsylvania that a vendee can defeat an action at law, brought by the vendor for an installment of purchase-money, under an executory contract for the sale of lands, by showing, not that the title tendered is actually bad, but that it is doubtful and unmarketable: *Colwell v. Hamilton*, 10 Watts, 413; *Ludwick v. Huntzinger*, 5 Watts & S. 51; *Swayne v. Lyon*, 67 Pa. St. 436. In *Allen v. Atkinson*, 21 Mich. 351, an action at law, Cooley, J., said: "The vendee had an undoubted right to a good title, and to a deed with proper covenants; and he had a right, also, to insist that the title should be a marketable one, not open to reasonable objection."

The case of *Methodist Episcopal Church Home v. Thompson*, 20 Jones & S. 321, came to this court, and the judgment was here affirmed upon the facts: 108 N. Y. 618. But the doctrine of the superior court cases above cited, as well as that of *Romilly v. James*, 6 Taunt. 274, was distinctly repudiated. Peckham, J., writing the opinion here, said: "We disagree with the court at general term upon the necessity, in such a case as this, of showing that the title is absolutely bad. We think that if there was a reasonable doubt as to the vendor's title, such as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, the plaintiff's cause of action would be sustained." While what was thus said was not necessary to the decision of that case, it is more than a mere *dictum*. The opinion concurred in by the entire court was written to set right what was deemed an erroneous view of the law taken in the court below, and which

might otherwise have been supposed, from the opinion or the judgment, to have received the approval of this court.

It has sometimes been said that the reason why a court of equity will not compel an unwilling vendee of real estate to take a title which, although good, is not marketable, is, that such a court is not competent to decide, or is, at least, unwilling to decide, doubtful questions of law and fact in such cases, at the hazard of what might afterwards be determined in a court of law: Rawle on Covenants, 433, note. Courts of law, with jurors as triers of the issues of fact, were deemed more competent than courts of equity to solve the doubts. But whatever foundation the reason may once have had, it has none now in this state since the union of law and equity in the same courts, and since equitable defenses can be set up in legal actions. Courts in equitable actions are just as competent here to deal with both the law and the facts of a case as they are in legal actions. If the conscience of a judge in an equitable action needs information, he can obtain the findings of a jury by submitting the issues of fact to them.

So now there is no longer any reason whatever for the distinction which some judges have made as to marketable titles in courts of law and equity. If a vendor cannot, by an action for specific performance, compel a vendee to take a conveyance of land because the title is doubtful and unmarketable, why should he be permitted to compel him, in an action at law, to pay for the land, both actions being triable in the same tribunal? Why should a purchaser be compelled to pay for a title which he is not bound to take? If a vendee who has paid part of the purchase-money sues to recover it back because the title tendered to him is unmarketable, the vendor, in the same action, can set up as an equitable defense or counterclaim a cause of action for the specific performance of the contract: *Morse v. Cochrane*, 107 N. Y. 35; and it would be quite an absurd administration of the law if the same court, at the same time, and upon the same evidence, should deny the defendant specific performance on the ground that his title was doubtful and unmarketable, and yet permit him to retain the purchase-money because his title was in fact good, although doubtful and unmarketable.

Dealings in real estate generally involve large pecuniary values, and large amounts are frequently invested in buildings and other improvements. The law is such that an adverse claim need not be asserted for many years,—until after

time has closed the mouths of living witnesses, and destroyed ancient muniments of title. For many purposes, a doubtful title is a worthless title. Hence it is generally the expectation of vendees entering into executory contracts for the purchase of land that they will receive a good title not only, but one free from reasonable doubt and damaging infirmity; and such a title it must be assumed that every fair, honest vendor expects to give, unless he is freed from the obligation by some express stipulation in the contract; and this understanding should be respected and enforced by both courts of law and equity. As said by Selden, J., in *Burwell v. Jackson*, 9 N. Y. 535: "Executory agreements for the purchase of lands are frequently made under circumstances which afford neither time nor opportunity for a thorough examination, and the purchaser cannot be assumed, prior to entering into such agreement, to have investigated the title." He pays his money in reliance upon the understanding that he is to have a title both good and marketable; and if the vendor does not tender him such a title, there is absolutely no reason why he should not receive back the money paid, and he should not be compelled to take an unmarketable title at the peril of losing what he has paid. Take the case where a vendee has made an executory contract of sale, paid the entire purchase price, and the vendor, at the time of performance by him, tenders a title which, by the record, appears to be in another, and yet, where he can show by parol evidence a lost deed or will vesting him with the title, shall the vendee be compelled to lose the money paid, or take an infirm, and, for many purposes, a worthless title? It is true that even courts of equity have, in some cases, compelled purchasers to take titles resting upon adverse possession. But in such cases, the adverse possession was established beyond any reasonable doubt. It is a fact usually open and notorious, and generally known to many witnesses. Such a title is strengthened by every passing hour. Such cases bear little analogy to one like this, where the lapse of time operates in a different way, and may speedily wipe out the only evidence competent to cure or remove the defect in the title tendered.

Here Barnes insists upon his lien, and refuses to cancel it. The vendors should be at the expense of clearing the title of this cloud; and it is not just that they should cast that burden upon the vendee, and require him to take an unmarketable title.

We therefore conclude that the judgment below is right, and should be affirmed, with costs.

VENDOR AND PURCHASER. — VENDOR OF REAL ESTATE IN HIS OWN RIGHT IS BOUND TO CONVEY the same with general warranty, unless it be otherwise agreed between the parties: *Hoback v. Kilgore*, 26 Gratt. 442; 21 Am. Rep. 317; compare *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560. The right of the purchaser to a good title is given by law, and does not rest upon the agreement of the parties: *Cullum v. Branch Bank*, 4 Ala. 21; 37 Am. Dec. 725; and the vendor's title must be beyond doubt, or he cannot compel the purchaser to take the land and pay the purchase-money: *Gans v. Renshaw*, 2 Pa. St. 34; 44 Am. Dec. 152; *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621. But a purchaser of land knowing the title to be defective buys at his own risk: *Rohr v. Kindt*, 3 Watts & S. 563; 39 Am. Dec. 53; *Walker v. Quigg*, 6 Watts 87; 31 Am. Dec. 452.

DEFECT OF TITLE IS GOOD DEFENSE TO VENDOR in an action for the purchase-money so long as the contract is executory: *Cooper v. Singleton*, 19 Tex. 260; 70 Am. Dec. 333; and see *Herrod v. Blackburn*, 55 Pa. St. 103; 94 Am. Dec. 49. If the vendee has held possession under the title derived from his vendor until defects which existed at the time of the sale have been cured by the statute of limitations, or by adverse possession, he will not be allowed to take advantage of them: *Piedmont Coal etc. Co. v. Green*, 3 W. Va. 54; 98 Am. Dec. 799.

IT IS INCUMBENT UPON OBLIGOR IN CONTRACT FOR SALE OF LAND, who seeks to avoid performance under a provision in the contract authorizing him to declare it void "if the title cannot be made good," to prove affirmatively that fact: *Deakin v. Underwood*, 37 Minn. 98; 5 Am. St. Rep. 827, and note 830.

VENDOR AND PURCHASER. — TITLE BY WARRANTY DEED. — A purchaser under a warranty deed cannot, in the absence of fraud or a defect in the title not known to him at the time of the purchase, defend against the payment of the purchase-money because one of several grantors is insolvent: *Neyland v. Neyland*, 70 Tex. 24. Where only one half of the purchase-money is paid because of the discovery of a defect in the title, but an agreement is made by the purchaser to pay the other half when, by the procurement of certain quitclaim deeds, such defect will be cured, the grantors may recover, although considerable time elapses before they do procure such quitclaim deeds: *Hartley v. Costa*, 40 Kan. 552. A grantee under a warranty deed cannot defend against an action for purchase-money on the ground that his grantor had no title: *McIntire v. De Long*, 71 Tex. 86; *Fagan v. McWhirter*, 71 Id. 567.

VENDOR AND PURCHASER. — DEFECT IN TITLE. — The pendency of condemnation proceedings against realty is such a defect in the title, under a contract to convey the same by a vendor to a purchaser, as will afford grounds for a refusal by the purchaser to accept the title: *Oreenough v. McLaughlin*, 33 Minn. 83.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LANDMESSER'S APPEAL.

[126 PENNSYLVANIA STATE, 115.]

GUARDIAN AND WARD. — **GUARDIAN OUGHT NOT TO BE SURCHARGED WITH MONEY** to which his ward is entitled, but which never came into the hands of the guardian, unless he has been guilty of gross negligence.

GUARDIAN AND WARD. — **GUARDIAN IS NOT LIABLE FOR MONEY OF HIS WARD'S ESTATE**, where, having placed a claim in the hands of an attorney, at the time in good standing, for collection, the attorney collected and embezzled the money, and the guardian took his judgment note for the amount, but made no attempt to collect it by legal means, because of the maker's insolvency. The fact that the guardian declined to incur costs and expenses in a fruitless effort to enforce payment by the ordinary remedies, or to apply for a rule or to institute a criminal prosecution against the attorney, did not constitute such negligence as would warrant a surcharge of the amount of the note.

EXCEPTIONS were filed to the account of Lewis Landmesser, guardian of Daniel Landmesser, a minor. The exceptions were dismissed by the court below, and the exceptant appealed. The opinion states the facts.

S. J. Strauss, for the appellant.

G. R. Bedford, for the appellee.

By COURT. It was found by the court below, and not denied, that the money with which it was attempted to surcharge this guardian never came into his hands. He ought not to be surcharged under such circumstances, unless he has been guilty of gross negligence.

The facts, briefly stated, are as follows: The appellee was

duly appointed guardian of the minor children of Daniel Landmesser. Among the assets which came into his hands was a policy of insurance on the life of Daniel Landmesser. The company declining to pay, he placed it in the hands of an attorney for collection. The attorney at that time was in good standing, and the guardian had no reason to suspect him of dishonest practices. He brought suit against the company, and some time during the year 1876, with the consent of the guardian, compromised the claim for fifteen hundred dollars, retained four hundred dollars of this sum as a fee or compensation for his services, and embezzled the residue. When the guardian attempted to get the money from his attorney, the latter informed him that he could not pay it over, because he had spent it. He gave him, instead, his judgment note for eleven hundred dollars, which the guardian has not collected, for the reason, as he alleges, that the attorney was, and is, insolvent, has no visible property, and that even his library has been sold. The fact of his insolvency has been distinctly found by the court.

It would seem, therefore, that the ordinary remedies for the collection of money would be inadequate to reach this case, and we are not prepared to say the guardian acted unwisely in declining to incur costs and expenses in a fruitless effort to recover it. His omission to apply to the court for a rule upon the attorney has been criticised. It may be that had such a proceeding been commenced in 1876, it might have resulted in payment. The efficacy of a rule in such cases depends in great measure upon the amount of reputation the attorney has left. If he has sufficient to be worth preserving, and has friends who are able and willing to come to his relief, it frequently results in payment. We do not, however, regard it as the legal duty of a guardian to resort to such a remedy, nor was he bound to institute a criminal prosecution against the defaulting attorney. The taking of the judgment note was not a loan of money; it was not even a settlement; the note was a mere memorandum to show the amount of money remaining in the hands of the attorney. A member of the bar who plunders the estates of minor children in this manner is not entitled to much consideration; at the same time, we do not see our way clear to punish the innocent guardian for the misdeeds of his counsel.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

GUARDIAN AND WARD — COURTS WATCH WITH GREAT JEALOUSY SETTLEMENTS OF GUARDIANS WITH THEIR WARDS, or any act or transaction between them affecting the estate of the ward: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 589, and note 597.

PERSONAL LIABILITY OF GUARDIAN ON PROMISE TO PAY DEBT OF WARD: *Nichols v. Sargent*, 125 Ill. 309; 8 Am. St. Rep. 378, and note 380.

COMPELLING ACCOUNT WITH REPRESENTATIVE OF DECEASED GUARDIAN: *Peel v. McCarthy*, 38 Minn. 451; 8 Am. St. Rep. 681, and note 684.

GUARDIAN IS NOT LIABLE FOR LOSS OCCASIONED BY LOAN OF WARD'S MONEY where he exercised ordinary prudence: *State v. Slevin*, 93 Mo. 252; 8 Am. St. Rep. 526, and note 531; *Slauter v. Favorite*, 107 Ind. 291; 5 Am. Rep. 106, and note 111; *Barney v. Parsons*, 54 Vt. 623; 41 Am. Rep. 858.

GUARDIAN ACTING IN GOOD FAITH is not chargeable with loss occasioned by depreciated currency: *Coffin v. Bramlett*, 42 Minn. 194; 97 Am. Dec. 449.

GUARDIAN BY IMPROVIDENTLY INVESTING WARD'S MONEY in the note of a single person renders the sureties on his bond liable for any loss that may occur: *Richardson v. Boynton*, 12 Allen, 138; 90 Am. Dec. 141.

LIABILITY OF GUARDIAN FOR NEGLIGENCE, GENERALLY: See *Fessenden v. Jones*, 7 Jones L. 14; 75 Am. Dec. 448, note.

GUARDIANS, LIABILITY OF. — A guardian is responsible for any loss resulting from a loan made by him of his ward's money without taking security, no matter how solvent the debtor when the loan was made: *State v. Gooch*, 97 N. C. 186. A guardian is liable for any loss of his ward's estate by the fraud or wrong of another, made possible by his own gross neglect, even though he may never have received the estate: *Boas v. Mfillken*, 88 Ky. 694. But taking a second mortgage by a special guardian appointed for the sale of an infant's lands, by a subsequent change of investment, though not favored, is not necessarily a breach of trust; for ordinary care and prudence is all that is demanded of such guardian under such circumstances: *Monroe v. Osborne*, 43 N. J. Eq. 248. Nothing but very culpable conduct will justify charging an administrator with compound interest in stating his accounts: *Alvis v. Oylesby*, 87 Tenn. 172. In a settlement of a guardian's account he should be charged with compound interest on all monies collected, or which he might have collected, for his ward: *Latham v. Wilcox*, 99 N. C. 367. And where the breach in a guardian's bond is a failure to account to the ward when he became of age, and it does not appear that the guardian actually received and appropriated interest, the measure of recovery is the amount due, including simple interest, to which ten per cent may be added by way of a penalty: *Peelle v. State*, 118 Ind. 512.

EMERY v. STECKEL.

[126 PENNSYLVANIA STATE, 171.]

MASTER AND SERVANT — WRONGFUL DISCHARGE FROM SERVICE — DAMAGES RECOVERABLE. — Where a servant has been discharged without sufficient excuse, before the expiration of his term of employment, *prima facie* he is entitled to recover to the extent of his wages for the whole term. He is bound, however, to use reasonable efforts to obtain employment elsewhere; but the burden of showing that he might by reasonable effort have found such employment elsewhere is upon the defendant.

Assumpsit brought by S. A. Steckel against J. D. Emery and T. B. Brown, trading as T. B. Brown & Co. The facts appear in the opinion. The jury found a verdict in favor of the plaintiff, and a rule for a new trial having been discharged, the defendant assigned error.

Edward J. Fox, Jr., and Edward J. Fox, for the plaintiff in error.

R. L. Cope, for the defendant in error.

CLARK, J. The contention of Steckel, the plaintiff below, was, that he had been employed by T. B. Brown & Co. to keep their books, etc., for a period of nine months from the fourth day of June, 1887, at the rate of seventy dollars per month; that he remained in the defendant's service and was paid at the rate agreed upon until July 25, 1887, when, without cause or sufficient legal excuse, he was discharged. He avers that he stood ready and willing at all times during the period stated to perform his duty, according to the nature and terms of his employment, but his services were refused; his claim is for damages upon the footing of his contract, that is to say, according to the rate of compensation agreed upon. The defendants deny the existence of such a contract; they allege that the plaintiff was employed at the rate of seventy dollars per month, but for no determinate period; that his withdrawal from the defendants' service was voluntary; that Steckel was incompetent, and failed to discharge the duties which he undertook to perform, and that the defendants were justified upon either or all of these grounds in discharging him from their employment. The facts in dispute, however, have been settled by the jury, and in the further consideration of the case here we must proceed upon the plaintiff's theory of the case on the facts.

In anticipation of this finding by the jury, the defendants' counsel, in substance, requested the court to instruct the jurors

that it was incumbent upon Steckel, after his discharge, to exercise due diligence to obtain other employment, and if they should find that he did not exercise a proper degree of diligence to that end, he could not recover. The learned judge of the court below declined so to instruct the jury, saying that the burden of proof was upon the defendants, and that as it was not shown the plaintiff either failed to seek employment or refused it when offered, or that he might have obtained employment had he made a proper effort, the point of law suggested had no application to the case. "There is no evidence in this cause," said the learned judge in his general charge, "which you can take into consideration in mitigation of damages, excepting the testimony showing that Mr. Steckel was employed during a part of the nine months, and for which he received a hundred dollars," etc. "The burden of proof was upon the defendants to show that he might have received other employment had he sought it," etc. The answer to this point, and this portion of the charge, to the same effect, are the only matters embraced in the several assignments of error.

It is well settled that where a servant has been discharged, without sufficient excuse, before the expiration of his term of employment, he may, in addition to the wages earned, recover the damages actually sustained; *prima facie*, he is entitled to recover to the extent of his wages for the whole term: *Ferreira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496. He is bound, however, to use reasonable efforts to obtain employment elsewhere; if he fail to find it of the same or a similar character in the same neighborhood, he may recover to the extent stated; but the burden of showing that he might, by reasonable effort, have found such employment elsewhere, is upon the defendant. This would seem to be the doctrine of all the cases: *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio, 609; 43 Am. Dec. 758; *Gillis v. Space*, 63 Barb. 177; *Sherman v. Transportation Co.*, 31 Hun, 162; *Horn v. Land Association*, 22 Minn. 233; Wood on Master and Servant, 245, 246, and cases there cited. The same rule is announced in 2 Greenl. Ev., sec. 274, citing, among other cases, *Costigan v. Mohawk etc. R. R. Co.*, *supra*, where the cases in this country and in England are collected, and the question fully discussed. The defendant being the wrong-doer, as between him and the person wronged, the presumptions are in favor of the latter. It is to relieve himself from the results of his own wrong-doing, by way of mitigation merely, that the defendant may make this defense, and the

burden of proof under such circumstances of right should rest with him who asserts the fact, and would avail himself of it. What is a reasonable effort is necessarily a question of fact for the jury, dependent upon the circumstances of each case.

Our own cases are to the same effect. In *King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419, the rule is stated with much clearness, that in this class of cases the plaintiff is *prima facie* entitled to the stipulated compensation for the whole time. "If so," says the learned judge delivering the opinion, "the burden of proof in regard to his employment elsewhere, or his ability to obtain employment, must necessarily rest on the defendant. All evidence in mitigation is for a defendant to give. In its nature it is affirmative, and hence it is for him to prove who asserts it. But the possibility of obtaining other similar employment, or the fact that other employment was obtained, bears upon the case only in mitigation of damages, and is therefore a part of the defendant's case." This case was followed by *Kirk v. Hartman*, 63 Pa. St. 107, where it is said that the question must be considered as settled in *King v. Steiren*, *supra*; and to the same effect are the cases of *Wolf v. Studebaker*, 65 Pa. St. 459, and *Chamberlin v. Morgan*, 68 Id. 168.

The judgment is affirmed.

MASTER AND SERVANT—REMEDIES OF EMPLOYEE WRONGFULLY DISCHARGED FROM SERVICE BEFORE END OF TERM: 1. He may elect to treat the contract as rescinded, and sue on a *quantum meruit*; or 2. He may sue for an entire breach of the contract by the defendant, and recover all damages sustained up to the trial; or 3. He may wait until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387, and see cases in note 391; *Ryan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 560; *Webster v. Wade*, 19 Cal. 291; 79 Am. Dec. 218, and note 219.

ONE SUFFERING FROM BREACH OF CONTRACT must so act as to make his damages as small as he reasonably can: *Wright v. Bank of Metropolis*, 110 N. Y. 237; 6 Am. St. Rep. 356, and note 364.

DUTY OF EMPLOYEE WRONGFULLY DISCHARGED TO ACCEPT EMPLOYMENT BY OTHERS: See *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8. If the employer wishes to show, in mitigation of damages, that the employee was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected, the burden of proof is upon him: *King v. Steiren*, 44 Pa. St. 99; 84 Am. Dec. 419; compare *Hunt v. Crane*, 33 Miss. 669; 69 Am. Dec. 381.

MASTER AND SERVANT—DISCHARGE OF SERVANT.—Upon a breach of a contract of employment by a discharge of the employer before the expiration of his term of service, the employee is only bound to use reasonable diligence to procure other employment; but he is not bound to look for or accept occupation of another kind: *Fuchs v. Koerner*, 107 N. Y. 529. Where one has

been thrown out of employment, and sued his employer for a breach of contract, the burden of proof is upon the defendant to prove that plaintiff could have procured other work, by reason of which defendant's liability for damages is reduced: *Cincinnati etc. Ry Co. v. Lutes*, 112 Ind. 276. In an action of trespass on the case by an employee against his employer for wrongful discharge, and where no averment is made of malice or of special damages beyond loss of employment and wages, no evidence can be admitted as to special damages: *Lee v. Hill*, 84 Va. 919; compare *Collins v. Hankton*, 65 Mich. 220; *Tilford v. Fairfield Mfg. Co.*, 72 Iowa, 60.

CITIZENS' NATIONAL BANK v. PIOLLET.

[126 PENNSYLVANIA STATE, 194.]

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER. — **COMMERCIAL PAPER,** TO BE NEGOTIABLE, must be certain, unconditional, and not contingent. And a promissory note having on its face a written memorandum as follows: "This note is given for advancements, and it is the understanding it will be renewed at maturity," — is thereby deprived of the essential qualities of commercial paper, and an indorser of the note is relieved from liability upon his contract of indorsement.

ASSUMPSIT by the Citizens' National Bank of Towanda against V. E. Piollet. The facts appear in the opinion. By the direction of the court, the jury returned a verdict for the defendant. Judgment was entered upon the verdict, and the plaintiff assigned error.

D'A. Overton and B. M. Peck, for the plaintiff in error.

Edward Overton, Jr., and Elhanan Smith, for the defendant in error.

GREEN, J. This is an action against the indorser of a promissory note. He is sued upon his contract of indorsement, and not upon any other or independent special contract in relation to that indorsement. His liability, therefore, in the present action must be the technical liability of an indorser, or the suit must fail. The note itself, without the written memorandum which appears upon its face, is a complete and perfect obligation of a negotiable character; and if the written memorandum were not there, we know of no reason why there should not be a recovery against the defendant as a mere indorser. But the memorandum is there; it is not alleged nor offered to be proved that it is there without authority, and if it has a controlling effect upon the note, it must be treated as a part of it. Its meaning is entirely plain.

The words written across the end of the note, and on the

face of it, in immediate proximity to the words of the note, are: "This note is given for advancements, and it is the understanding it will be renewed at maturity." The statement that it is given for advancements does not affect the certainty of the note, and it could easily be regarded as a mere memorandum, not changing the contract, and therefore not material. But the remainder of the writing is an agreement that the note will be renewed at maturity. As the bank is the holder, and discounted the note when it was given, it is undoubtedly affected by the terms of the memorandum, and must be considered as having agreed to renew the note at its maturity. This being so, the obligation of the note is not an absolute, unconditional contract to pay the money at maturity. It is a qualified obligation to pay, with a condition that, instead of paying, the holder may give another note in its place which the bank would be bound to accept instead of money. This being so, the case comes within the rule that commercial paper, to be negotiable, must be certain, unconditional, and not contingent.

In *Overton v. Tyler*, 3 Pa. St. 346, 45 Am. Dec. 645, Gibson, C. J., said: "But a negotiable bill or note is a courier without luggage. It is requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it, and destroy it. But a memorandum which is merely directory will not affect it." In *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201, Sharswood, J., said: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor."

It is manifest from the foregoing that the only inquiry necessary to determine the question of negotiability is the effect of the memorandum upon the terms of the note. As we have seen, it makes an important change in the note, in that, instead of the note being a distinct contract to pay a fixed sum of money at a day certain, the holder has agreed to accept,

instead of payment of money, another note payable at another time which is not fixed. The obligation of the note, therefore, is uncertain, depending on whether the maker chooses to pay it, or give a new note in place of it. This uncertainty destroys its negotiability, and for that reason relieves the indorser. As this is not an action against the indorser to recover damages for breach of an agreement by him to continue his indorsement, that aspect of the case cannot be considered.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS — TERM "NEGOTIABLE," SIGNIFICATION OF: *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147. A promissory note, encumbered with conditions and contingencies, is clearly non-negotiable: *Hubbard v. Mosely*, 11 Gray, 170; 71 Am. Dec. 698, and note 699; *Blake v. Coleman*, 22 Wis. 415; 99 Am. Dec. 53, and note 54. And it has been frequently held that a stipulation expressed in the note for the payment of an attorney's fee, in case suit is brought upon it, destroys the negotiable character of the instrument: *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201; *First Nat. Bank v. Larsen*, 60 Wis. 206; 50 Am. Rep. 365; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675, and note 677; *Maryland etc. Mfg. Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 75. But see, *contra*, *Nickerson v. Sheldon*, 33 Ill. 372; 85 Am. Dec. 280; *Peyser v. Cole*, 11 Or. 39; 50 Am. Rep. 451; *Trader v. Childester*, 41 Ark. 242; 48 Am. Rep. 38. It has been held that a note otherwise negotiable was still such, although payable "with current rate of exchange" on a distant place: *Smith v. Kendall*, 9 Mich. 241; 80 Am. Dec. 83; but an opposite conclusion was reached in *Low v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742, and see note 745, 746.

NEGOTIABLE INSTRUMENTS — WHAT ARE AND WHAT ARE NOT: See *Chandler v. Carey*, 64 Mich. 237; 8 Am. St. Rep. 814, and particularly cases cited in note 815.

NEGOTIABLE INSTRUMENTS. — When a note is once negotiable, it remains so till paid, and its negotiability is not destroyed by becoming overdue: *Adair v. Lennox*, 15 Or. 489. Where A gave B his note containing a provision that if the note should not be paid at maturity, the payee should take possession of and sell A's property to satisfy the debt, such note was not negotiable: *South Bend Iron Works v. Paddock*, 37 Kan. 510. Warrants drawn by a village upon the village treasurer are not negotiable instruments: *Mier v. Vedder*, 66 Mich. 101; nor is a township order a negotiable instrument: *Township of Snyder v. Bovaird*, 122 Pa. St. 442; 9 Am. St. Rep. 118. An unauthorized insertion of the rate of interest in a negotiable note, after its signature, will not render the note void, and it will bear the legal rate of interest: *First Nat. Bank v. Wolf*, 79 Cal. 69.

USHER v. WEST JERSEY RAILROAD COMPANY.

[126 PENNSYLVANIA STATE, 206.]

NEGLIGENCE — ACTION FOR CAUSING DEATH — WHO MAY SUE. — The right of action for wrongfully or negligently causing the death of a person is purely statutory, and the action can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted.

NEGLIGENCE. — PENNSYLVANIA STATUTE, ACT OF APRIL 26, 1855, P. L. 309, GIVING RIGHT OF ACTION FOR NEGLIGENTLY CAUSING DEATH to the widow, if there be one, of the deceased, has no extraterritorial force enabling her to sue in the courts of Pennsylvania for the death of her husband caused by negligence in a foreign state.

NEGLIGENCE. — BY NEW JERSEY STATUTE, ACT OF MARCH 3, 1848, P. L. 151, RIGHT OF ACTION FOR NEGLIGENT DEATH is created for "the exclusive benefit of the widow and next of kin," but "every such action shall be brought by and in the names of the personal representatives of such deceased person." Under the provisions of this statute, a widow has no authority to bring suit in her own name in the courts of Pennsylvania upon a cause of action arising in New Jersey.

ACTION in case brought by Josephine Usher against the West Jersey Railroad Company, to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. On the trial, the plaintiff proved the death of her husband, a citizen of Pennsylvania, by being thrown from the defendant company's train while a passenger thereon, in the state of New Jersey, and that he left surviving him a widow, the plaintiff, and one child. The plaintiff then put in evidence the statute of New Jersey, set out in the opinion. After the plaintiff rested, the defendant moved for a nonsuit, upon the ground that the action was not brought by the personal representative of the deceased husband, as required by the New Jersey statute, and the court allowed the motion. The rule to show cause why the judgment of nonsuit should not be vacated was discharged, whereupon the plaintiff assigned error.

George S. Graham and John Roberts, for the plaintiff in error.

David W. Sellers, for the defendant in error.

MITCHELL, J. John F. Usher was killed by an accident upon the defendant's road in New Jersey, under circumstances of negligence, as we must assume, for which he would have had an action had he been only injured. But having been killed, his right of action, under the universal rule of the common law, terminated with his life. If any right of action remained, it must have been wholly based upon statute, and

as the occurrence out of which, if at all, the right must arise, took place in New Jersey, it is to the statutes of that state alone that we must resort to ascertain the nature of the right, and the party in whom it is vested.

It is not questioned that the action is transitory, and that it may be sustained in the courts of this state, if jurisdiction be acquired over the defendant. Adverse decisions have been made on this point in several states, but for Pennsylvania it has been settled by this court in *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250; 56 Am. Rep. 200. Comity will enforce rights not in their nature local, and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common-law or statutory origin. There is no difference in this respect between such rights, except in the presumption that common-law rights in other states are similar to our own, and the absence of such presumption, and consequent necessity of proof, in regard to rights merely statutory.

The statute of New Jersey, March 3, 1848, P. L. 151, provides, in section 1, "that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person; the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," etc.

The present action was brought by the widow of Usher, and we thus have the question presented, whether she can maintain the action in her own name and to her own use.

The question has never been expressly decided in this state, nor, so far as we can learn, elsewhere. It arose directly in *Patton v. Pittsburgh etc. R'y Co.*, 96 Pa. St. 169, and was ruled

by the judge at the trial against the plaintiff, who, as in the present case, was the widow. In this court, the judgment was reversed, but upon other grounds. The opinion of the court was, however, indicated very clearly by what was said in regard to the allowance of an amendment making the administratrix plaintiff: "It very clearly appeared there was a mistake in omitting the name of the administratrix of William Patton, for the statute under which the action was brought directed it should be by and in the name of the personal representative. . . . This case was tried just as if the legal plaintiff had brought suit, and was upon the record, and the amendment ought to have been allowed. When it was moved, a year had not elapsed from the date of the decedent's death, . . . and if the trial was free from error, it would have saved the verdict." This court, however, did not mean to pass upon the form of action, for the obvious reason that the larger question, whether the action could be maintained in this state at all, was the main question attempted to be raised, but which the court held was not in fact raised, because of an imperfect reservation of the point at the trial below, and therefore refused to pass upon it. That main question was subsequently decided in the affirmative in *Knight v Railroad Co.*, 108 Pa. St. 250; 56 Am. Rep. 200; but the present question has remained open until now. The passage quoted, however, from the opinion of our late brother Trunkey is valuable as showing the inclination of the court at that time.

The case of *Books v. Danville Bor.*, 95 Pa. St. 158, also, has some weight as raising the converse of the present question. That was an action by an administrator for injuries to the decedent, and it was sought to be maintained on the provision of the constitution that the action for such injuries "shall survive." A very eminent judge of the common pleas—Elwell, P. J.—held, however, that, as the constitution permitted the legislature to prescribe for those whose benefit the action should be prosecuted, and as there was no other legislation than the act of 1855, the administrator had no right. The plaintiff was accordingly nonsuited, and this court sustained the judgment, holding that, as the action was purely statutory, it could only be maintained by the party to whom the statute gave it.

Nor, as already said, have we found any direct case upon the point in other states. The general course of decisions

bearing collaterally upon it is, however, adverse to sustaining such an action, except by the very one whom the statute names as entitled to bring it. Thus in *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121, it was held that an administrator appointed in Ohio could not maintain an action in Ohio for a death caused by negligence in Illinois, although it was proved that the statutes of both states were alike, and gave such an action to the administrator. The court held that the Illinois statute gave the action only to the Illinois administrator, and that while the Ohio administrator had a right of action by the Ohio statute, for causes arising in that state, yet that statute could not support an action for causes arising in Illinois.

Woodard v. Michigan etc. R. R. Co., *supra*, was approved and followed by the supreme court of Massachusetts in *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85, upon the same grounds, the only difference being that in the latter case it did not appear that there was any law in Massachusetts giving an action under similar circumstances.

A broader view of the statute was, however, taken in *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48, 38 Am. Rep. 491, and *Dennick v. Railroad Co.*, 103 U. S. 11, where it was held that the statutes, though not having any extraterritorial force, would be recognized by comity, and that as they give an action to the personal representative generally, without limitation as to the authority under which he is appointed, an administrator of the home jurisdiction can maintain the action, even for causes arising in another state, upon proof of the laws of such state authorizing the action.

With these latter decisions accords our own case of *Knight v. Railroad Co.*, already cited. But none of the cases raise or discuss the question involved here, whether the widow can maintain an action in her own name, under a foreign statute, which expressly directs the action to be brought by the administrator, though for the ultimate benefit of the widow and next of kin.

We are thus left to discuss the question upon general principles.

At the outset, we may say that the action can get no support from the fact that a closely similar statute in this state gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children. It is not seriously claimed that our statute has any extraterri-

torial force which can produce rights from occurrences in New Jersey. On this point all the authorities agree: *Whitford v. Railroad Co.*, 23 N. Y. 484; *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Richardson v. Railroad Co.*, 98 Mass. 85; *Commissioners to Use of Allen v. Railroad Co.*, 45 Md. 41; *Selma etc. R. R. Co. v. Lacy*, 43 Ga. 461; *Anderson v. Railroad Co.*, 37 Wis. 321; *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46; 26 Am. Rep. 742.

The language of the New Jersey statute is, that "every such action shall be brought by, and in the names of, the personal representatives of such deceased person." As this language is entirely clear, unqualified, and peremptory, it would seem to settle the question, without more. But it is sought to escape this conclusion by insisting,—1. That as the amount recovered in such action is to be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name; and 2. That the second section concerns only the remedy, and therefore may be disregarded by the courts of Pennsylvania, who may administer the rights of the *lex loci* under the procedure of the *lex fori*. I believe, however, that a brief consideration will show that neither of these grounds is tenable.

As to the first, there is no room for latitude of construction. The meaning of the language used is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued; and we have no right, when the legislature have commanded one form, to say that another will serve the purpose equally well. The law-making power has settled the remedy as well as the right, and courts are not authorized to vary or depart from either. Moreover, the distinction made in this statute between the party having the right of action and the ultimate beneficiary is familiar to all common-law states, and is of settled importance, especially in those where, as in New Jersey, the administration of law and equity is not only in separate forms, but by separate tribunals. In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded. In this connection, the language of our brother Green, in *Books v. Danville Bor.*, 95 Pa. St. 166, is very strong and pertinent: "No other persons have been clothed with the right, and hence no other persons can sustain such actions. The present action is brought by an

administrator to recover damages for injuries resulting in the death of the intestate. But the legislature has not declared that such a person may maintain such an action, and hence the right to do so does not exist."

But secondly, Is the question of the party who may sue merely a question of the remedy, and therefore determinable by the law of the forum? Undoubtedly there are cases where it is so. Whether an infant shall sue by guardian or by next friend, and whether an assignee shall sue in his own name or that of his assignor, and the like, are clearly questions of procedure only. But where the matter is not of form merely, but of right, the remedy must follow the law of the right. The second section of the statute in question cannot be disregarded, or separated from the first; they are as closely interwoven and as necessary to each other as if they were parts of the same section. This is plain from the most cursory examination. The first section confers no right, of any kind, or on anybody. It merely imposes a liability. The second section confers the right, and without it the first would be utterly nugatory and ineffective. Apart, the first gives no right, the second imposes no liability; together, they give the liability, the right, the party to enforce the right, and the party entitled to the benefit; and they give all these together, by plain words which constitute one grant, to wit, an action, to be enforced as given, and not capable of being split up into different rights, with varying remedies, according to the tribunals in which they may chance to be asserted.

If this result were at all doubtful on principle, there is another consideration of controlling weight. It is unquestionable that in New Jersey the personal representative alone can sue, and it is equally clear that he can maintain his action there, notwithstanding this action, or any other, brought by another party in another jurisdiction. It would be a strange perversion, not only of comity, but of justice, to entertain an action here which would either oust the right of the legal party in the place where the cause of action arose, or subject the defendant to as many separate recoveries as parties could be found who might be entitled under the laws of different forums to bring actions under similar circumstances.

Nor is the argument helped by the suggestion that as the action by the personal representative is only a means to an end, i. e., the benefit of the parties ultimately entitled to the damages, the court can control the disposition of the verdict,

so as to administer the rights of all parties according to the law of New Jersey. Why should our courts undertake such an unnecessary task in the face of a direct prohibition by the law of New Jersey? The administration of the law of another jurisdiction is never desirable, and at best is full of difficulties and uncertainties. It is assumed *ex necessitate* when assumed at all, and it would surely be pushing comity beyond its legitimate bounds, to assume to do for the tribunals of New Jersey what they certainly would not do for themselves,—administer the rights of one party through a suit brought by another.

Before closing, I may say that the statute of New Jersey, as of most of the other states, is an almost literal transcript, as far as it goes, of the 9 and 10 Victoria, chapter 93, commonly known as Lord Campbell's act. I have examined the English digests without finding any case bearing upon this question, but it may be noted, as some indication of the view taken of that act, that a possible inconvenience, such as is alleged in this case, has been provided for by the 27 and 28 Victoria, chapter 95, section 1, which enacts, that if there shall be no executor or administrator, or there being such, he shall fail to bring suit for the space of six months after the death, then such action may be brought by and in the name of all the persons for whose benefit the action by the executor would have been. This is certainly a strong indication of the understanding that nothing but a statute could authorize an action in the name of any one but the personal representative to whom the right was given in the first instance.

The learned judge was right in entering a nonsuit, and the judgment is affirmed.

NEGLIGENCE—ACTION FOR DEATH CAUSED BY.—An administrator appointed in another state cannot maintain an action in Kansas for the negligent killing of his intestate, where he cannot maintain such an action under the law of the state of his appointment: *Limekiller v. Hannibal etc. R. R. Co.*, 33 Kan. 33; 52 Am. Rep. 523; to the same effect: *Taylor v. Pennsylvania Co.*, 78 Ky. 348; 39 Am. Rep. 244; *Fawter v. Missouri Pacific R'y Co.*, 84 Mo. 679; 54 Am. Rep. 105. And it was held that under a statute of Kansas conferring a right of action for damages for death caused by a wrongful act, no action can be maintained where the death, though occurring in Kansas, was caused by injuries inflicted in another state: *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46; 26 Am. Rep. 742. But an action for damages may be maintained in Iowa for death caused by negligence in Illinois, the statutes of both states allowing such remedy in substantially the same form: *Morris v. Chicago etc. R. R. Co.*, 65 Iowa, 727; 54 Am. Rep. 39; and to the same effect, see *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; 38 Am. Rep. 491; *Debevoise v. New York etc. R. R. Co.*, 98 N. Y. 377; 50 Am. Rep. 683; *Boyce v. Wabash R'y Co.*,

63 Iowa, 70; 50 Am. Rep. 730. And it was held by the Minnesota court that a cause of action accruing in Iowa, under a statute rendering railway corporations liable to their employees for injuries by the negligence of their co-employees in the operation of such railway, may be enforced in Minnesota, although there is no corresponding statute there: *Herrick v. Minneapolis etc. R. R. Co.*, 31 Minn. 11; 47 Am. Rep. 771.

WHO MAY SUE FOR DAMAGES FOR NEGLIGENCE CAUSING DEATH. — A step-father may represent his wife's children, as next friend, in an action for damages for the death of their father: *International etc. R. R. Co. v. Kuchn*, 70 Tex. 583. Where a father, and husband, is dead, an action accrues in favor of the children for the homicide of their mother, but no such action can be maintained if the father is living: *Scott v. Central R. R.*, 77 Ga. 450. An administrator can maintain an action for personal injuries to his intestate, although such injuries may result in immediate death: *Worden v. Humeston etc. R'y Co.*, 72 Iowa, 201; *Connors v. Burlington etc. R'y Co.*, 71 Id. 490. Whenever the statute of a sister state gives a right of action for the destruction of one person's life through the negligence of another, such action may be maintained in Kentucky, unless such statute was not intended to operate beyond the limits of the state enacting it; so that a personal representative appointed in Kentucky can maintain an action there under a foreign statute, where the cause of action arose under that statute: *Bruce v. Cincinnati R. R. Co.*, 83 Ky. 174.

PEOPLE'S MUTUAL ACCIDENT ASSOCIATION v. SMITH

[126 PENNSYLVANIA STATE, 317.]

INSURANCE — IMMEDIATE NOTICE, WHAT IS — PROOFS OF LOSS. — The terms of an accident policy contracted for "immediate written notice" of the accident to be given the association, and for "proofs of loss," the effect of the accident, to be furnished within six months thereafter. In construing these terms, the word "immediate" must be taken to mean within a reasonable time after the injury, under all the facts and circumstances of the case; and what is a reasonable time is for the jury to decide, unless the delay has been so great that the court may rule it as a question of law. The proofs of loss, in such case, may be read in evidence for the purpose of showing that such proofs had been made in compliance with the terms of the policy, but if offered as evidence of the plaintiff's claim, their admission would be error.

ASSUMPSIT by Dr. G. W. Smith against the People's Mutual Accident Association of Pittsburgh to recover upon a policy of membership for the loss of the sight of an eye. The facts appear in the opinion. The jury returned a verdict in favor of the plaintiff, and judgment having been entered thereon, the defendant assigned error.

S. S. Blair, for the plaintiff in error.

Aug. S. Landis and Matthew Calvin, for the defendant in error.

PAXSON, C. J. The plaintiff brought this action of *assumpsit* in the court below against the defendant company, on a policy or certificate of membership, for the loss of sight of an eye, alleged to have been caused by an accidental stroke of a whip when handled by himself. The main question is, whether he was sufficiently prompt in giving notice to the company of the accident. The policy contains this provision: "Provided, further, in the event of any accidental injury, for which a claim may be made under this certificate, immediate written notice shall be given the association in Pittsburgh, giving full particulars of the accident and injuries; and sufficient and satisfactory proof of loss, either for death or relief, shall be furnished the association within six months of the happening of the accident; otherwise, all rights to recover under this certificate for said accident shall be null and void, and forfeited to the association."

The accident, which resulted in the loss of the plaintiff's eye, occurred on September 4, 1887. He was a physician, and while riding in his buggy, engaged in his professional duties, by some accident his eye was struck by the lash of his whip. It was not at first thought to be dangerous, at least to the extent of losing his eyesight, and for some days the plaintiff treated the injured eye himself. It was not long before he was confined to his room, and called in other medical aid. He testified that it was not until the 15th of the following October that he became convinced that he would lose the use of his eye. He gave a formal notice, in writing, to the company of the accident on October 1st, and claimed for said loss. The contention of the defendant is, that the notice should have been given immediately after the accident, and the court below was asked to so instruct the jury. This the learned judge refused to do, saying: "Unquestionably, if the plaintiff did not give immediate written notice of the accident and injury, he cannot recover. This is a condition precedent to any recovery. But we cannot undertake to say to you, as a matter of law, that the written notice mailed on October 1st was not an immediate notice under the circumstances, on a reasonable construction of this provision."

It is our duty to give the policy in question a fair, business-like, common-sense interpretation. It is in such sense that the parties to the contract probably understood it. The plaintiff was not claiming for weekly benefits. Had he done so, there would have been more force in the defendant's position

that he should have given notice of the accident immediately after its occurrence, on September 4th. His claim, however, was for the loss of his eye, and it is difficult to see how he could with any propriety make such a claim until he had actually lost it, or it had become clear that he would lose it. How could he have truthfully made such a claim on the 5th of September? And had he done so, and his eyesight been restored, the probability is, the defendant company would have criticised his claim even more closely than it has done now.

In the case of *Lyon v. Railway Passenger Assurance Co.*, 46 Iowa, 631, the insured was injured whilst traveling on a railway train. He brought suit to recover a weekly allowance. By the terms of the policy he was required to give "immediate notice to the company at Hartford, Connecticut." The injury was received on September 27th, and notice was sent to the company at Hartford on October 28th following, thirty-one days afterwards. During this time he was under medical treatment for eight or nine days at one place, when he returned to his home, and came under the treatment of other physicians. The court held that, under all the circumstances, it was not error in the court below to refuse to instruct, as a matter of law, that the notice was not given in proper time. The question was left to be determined by the jury as one of fact.

It is true, the delay in such cases may be so great as to justify the court in ruling it as a question of law. There was no such delay in the case in hand, however. The word "immediate" in the contract must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case, and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the court may rule it as a question of law. A person might be so injured as to be physically unable to give notice for weeks. Hence it is that such questions are referred to the jury to say whether, under all the circumstances, there has been an unreasonable delay in giving notice. In the present case, we are not required to go so far as the court did in the Iowa case. I see no reason which requires notice to be given of the loss of an eye until the eye is destroyed, any more than that in a life policy a man should give notice of his death before he dies.

The third assignment, in reference to the proofs of loss, is not in accordance with the rules of court. I do not find the proofs in the paper-book. If admitted for the purpose of show-

ing that such proofs had been made in compliance with the policy, they were competent. If offered and read to the jury as *prima facie* evidence of the plaintiff's claim, their admission would have been error: *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Lycoming Ins. Co. v. Schreffler*, 42 Id. 188; 82 Am. Dec. 501. I do not understand this to have been the case. If it was, it has not been sufficiently pointed out to us.

Judgment affirmed.

INSURANCE — ACCIDENT INSURANCE POLICIES ARE TO BE LIBERALLY INTERPRETED, and conditions therein must be construed strictly against those for whose benefit they are reserved. In their construction, their words should be taken in that sense to which the apparent object and intention of the parties limit them, and which is to be gathered from the surrounding clauses, and from all parts of the instrument: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758, and note 766.

WHERE LIFE POLICY REQUIRES NOTICE AND PROOF OF DEATH AS CONDITION PRECEDENT TO PAYMENT, notice alone is not sufficient, and although the insurers, on receipt of such notice, do not call for further proof, they do not thereby waive their right to insist upon it: *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169; 19 Am. Rep. 151. A life policy was payable in sixty days after receipt and acceptance of proofs of death, and the company was in the habit of furnishing blanks for such proofs on application. The plaintiff applied for them, and the company refused them on the ground that the policy was void, and it recognized no claim under it. This was held to be a waiver of proofs of death: *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617.

NYE'S APPEAL.

[126 PENNSYLVANIA STATE, 341.]

HUSBAND AND WIFE. — A WIFE WHO ABANDONS HER HUSBAND, and for several years before his death renounces all conjugal intercourse, without such reasonable cause as would entitle her to a divorce, is not entitled to the exemption of three hundred dollars out of his estate provided by the Pennsylvania exemption act of April 14, 1851, P. L. 613, for the benefit of a decedent's family.

MARRIAGE AND DIVORCE. — SINGLE ACT OF CRUELTY OR INDIGNITY, OR OF COARSE AND UNGALLANT CONDUCT on the part of the husband, although such act amounts to a technical assault, does not constitute sufficient ground for a divorce at the suit of the wife.

HUSBAND AND WIFE. — WIFE'S DOWER RIGHT IN HER DECEASED HUSBAND'S ESTATE DOES NOT DEPEND upon the existence of the family relation at his death, and is not barred by her willful desertion of her husband in his lifetime without reasonable cause

C. H. Ruhl and Daniel Ermentrout, for the appellants.

Hiram Y. Kaufman, for the appellee.

McCOLLUM, J. John C. Nye, a widower aged seventy years, and Elizabeth Reigel, a widow aged thirty years, were married in the summer of 1878, and dwelt together as husband and wife until the fall of 1879, when she left his home and moved into her own house, about ten miles distant, where she resided until his death, in November, 1886. A short time after the separation she commenced suit against him under the desertion statutes, which, upon full hearing and investigation by the court of quarter sessions, resulted in a dismissal of her complaint. After that there was no communication between them, and no effort on her part to assert the rights or to discharge the duties of a wife. That she had deliberately resolved upon a permanent separation from Nye and his family is evident from what she said to William Schlappig the morning she left. Nye was unwilling that she should leave, and tried to persuade her to remain with him. No angry or unkind words passed between them on that occasion. While in his presence she made no complaint of misconduct on his part, and did not assign any reason for her determination to depart from his home. The testimony of the witnesses who were present, and who describe the conversation and conduct of the husband and wife, stamps the separation as a willful and malicious desertion on her part, and there is nothing shown of her subsequent behavior to deprive it of that character.

After his death she claimed a widow's rights in his estate, and the orphans' court awarded her the exemption, the fees of the witnesses to support her claim to it, and statutory dower. From this decree, Cain Nye, a son and heir of the decedent, appealed.

In *Odiorne's Appeal*, 54 Pa. St. 178, 93 Am. Dec. 683, this court, in an opinion by Chief Justice Woodward, said: "Where a wife leaves her husband, and renounces all conjugal intercourse a considerable time before his death, she becomes not such a widow, after his death, as was in the contemplation of the legislature when the acts of assembly were passed which entitle her to administer his estate and to appropriate three hundred dollars of it to her own use. The acts contemplate the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of the duties imposed by the relation."

The exemption provided by these statutes has been de-

scribed as a pure gratuity by force of law for the benefit of a decedent's family: *Sipes v. Mann*, 39 Pa. St. 417. It does not belong to a woman who did not, at least in contemplation of law, sustain a family relation to her husband at his death: *Hettrick v. Hettrick*, 55 Id. 290. It was not created for a wife who abandons her husband without reasonable cause, and for seven years before his death refuses to perform her marital duties. The reasonable cause which justifies a wife in abandoning her husband is such as would entitle her to a divorce: *Cattison v. Cattison*, 22 Id. 276. In the language of Justice Strong, in *Grove's Appeal*, 37 Id. 443, "separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as ground for the dissolution of the marriage bond."

It remains to inquire if Mrs. Nye had reasonable cause for abandoning her husband. As we have seen, her departure from his home was deliberate, and without complaint or explanation to him. It is incumbent on her, therefore, to show conduct on his part which justified her in severing the family relation. This she has undertaken to do, and the evidence on which she relies for her justification is before us. It shows but one act of personal violence, and the single witness of that was her son, who was then but ten years old. Adam Reichard testified that he was frequently at Nye's house, and that he once, while they were quarreling, heard Nye threaten to strike her with a salt-box. This is all of threat or violence which the evidence discloses. Mrs. Nye's declarations to third persons, in the absence of her husband, were not competent to affect him, and in view of the time when and the circumstances under which they were made, were not admissible as a part of the *res gestæ*. It is probable, however, that these declarations were all made with reference to the one act described by her son, and the provocation of that, according to his recollection, was her refusal to sleep with her husband, and this was conceded in her statement to Kauffman, together with an admission that she struck him in the face. There is no conflict in the evidence, and no question of the credibility of witnesses involved in the case. From the facts disclosed by the legal testimony, it is our duty to decide whether a justification of the abandonment is shown.

In *May v. May*, 62 Pa. St. 210, it was said: "A single act of cruelty, on a single occasion, as suggested in *Richards v.*

Richards, 1 Grant Cas. 891, may be so severe, and attended with such corresponding circumstances of atrocity, as might, under a fair and liberal construction of the act, justify a divorce. But no single act of cruelty, however severe, that comes short of endangering life, is sufficient to justify a divorce." A single act of indignity will not be sufficient, nor indignities provoked by the complaining party, unless where the retaliation is excessive. It is not every coarse and ungallant act, even though it amounts to a technical assault, that authorizes a severance of the marriage bond. It was well said by Chief Justice Lowrie, in *Richards v. Richards*, 37 Pa. St. 225: "It is not all unlawful and barbarous acts that are made grounds of divorce. We do not divorce savages and barbarians because they act as such towards each other." The question with which we have to deal is not one of sentiment or chivalry, but of law and its faithful administration, and we have no hesitation in declaring that, under our decisions and the evidence in this case, Mrs. Nye is not entitled to the exemption of three hundred dollars out of the estate of her deceased husband, or to the fees of her witnesses in prosecuting her claim for it. The first and second specifications of error are sustained.

Dower does not depend on the existence of the family relation at the death of the husband, and is not barred by desertion. The third specification is not sustained.

The decree of the orphans' court awarding to Elizabeth Nye a widow's exemption of \$300, and \$24.12 for witness fees, is reversed, and it is now considered and adjudged that the remaining claims of creditors and for expenses be paid according to said decree; that the balance for distribution, to wit, \$38.85, proceeds of personalty, and \$1,247.94, proceeds of real estate, be distributed as follows, viz.: One third of the personal fund to Mrs Elizabeth Nye absolutely, and the interest upon one third of the real estate fund to be paid to her annually during her natural life; two thirds of the personal and real estate fund to be paid to the children and heirs of the decedent named in the decree of the orphans' court, share and share alike, and the remaining one third of the said fund to be paid to the said children and heirs in the same proportion as above at the death of Elizabeth Nye, widow of decedent. It is ordered that the costs of this appeal be paid by the appellee.

HUSBAND AND WIFE. — VOLUNTARY ABANDONMENT BY WIFE OF HUSBAND, and living with another man in another state in continuous lewd intercourse for a number of years, and until her deserted husband's death, debars her of all right, as widow, which she may ever have had to homestead in lands owned by the husband at his death: *Prater v. Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623; and see *Christie's Succession*, 96 Am. Dec. 412-415, note.

WIFE SEPARATED FROM HUSBAND BY VOLUNTARY AGREEMENT FOR MONEY CONSIDERATION ceases to constitute a member of his family; and on his death she is not entitled to the statutory allowance out of his estate for her maintenance: *Estate of Noah*, 73 Cal. 583; 2 Am. St. Rep. 829.

MARRIAGE AND DIVORCE. — Whether a divorce may be granted for a single act of cruelty is discussed in a note to *Palmer v. Palmer*, 40 Am. Rep. 463-465, where the cases are collected and reviewed. A single whipping or beating of a wife by her husband is held to be "extreme cruelty" justifying a divorce, although the wife provoked the assault by words: *Albert v. Albert*, 5 Mont. 577; 51 Am. Rep. 86.

WIFE'S RIGHT OF DOWER IS NOT DEFEATED by her desertion of her husband without adultery: *Wiseman v. Wiseman*, 73 Ind. 112; 38 Am. Rep. 115. Elopement or departure by the wife willingly from her husband, as well as adultery, is necessary to make the bar complete: *Elder v. Reel*, 62 Pa. St. 308; 1 Am. Rep. 414; *Bell v. Nealy*, 1 Bail. 312; 19 Am. Dec. 686. But under the law of Rhode Island, elopement of the wife, and living in adultery without reconciliation with the husband, is no bar to a claim for dower: *Bryan v. Batcheller*, 6 R. I. 543; 78 Am. Dec. 454.

DIVORCE — CRUELTY. — Unkindness which amounts to cruelty will revive former acts of cruelty, even though such former acts were once condoned: *Williams v. Williams*, 23 Fla. 324. A husband may condone his wife's infidelity by continuing his marital relations with her; and when adultery has been once condoned, it cannot be set up as a defense in a divorce suit by the wife against the husband for cruelty: *Farmer v. Farmer*, 86 Ala. 323. A false and malicious accusation of adultery, made by a husband against his wife, may constitute "cruel and inhuman treatment," within the meaning of the Minnesota statute: *Wagner v. Wagner*, 36 Minn. 239. A wife is entitled to a divorce for cruelty under section 2334 of the Alabama Code, where the husband's conduct generated a reasonable apprehension of violence to her person, attended with danger to life or health: *Farmer v. Farmer*, 86 Ala. 323. The definition of extreme cruelty, which will constitute a ground for divorce, is such conduct of a husband or wife as will reasonably create an apprehension of bodily injury, or does actually endanger the life, limb, or health: *Williams v. Williams*, 23 Fla. 324; *Meyers v. Meyers*, 83 Va. 806. That a wife once expressed a fear that her husband would poison her is not such cruelty as will warrant the granting of a divorce: *Sapp v. Sapp*, 71 Tex. 348. Divorce is properly granted on the ground of cruelty and inhuman treatment, where defendant once forcibly ejected plaintiff from his bed, and then used violence to her person, and upon other occasions used violence towards her, and that he also accused and unsuccessfully attempted to show upon trial that she was guilty of adultery: *Herberger v. Herberger*, 16 Or. 327. A divorce was properly granted on the ground of failure to support and cruel treatment, where the husband for one whole year, being able to support his family, furnished only \$2.50 for their support, and was in the habit of cursing and swearing at his wife, and using vile and indecent names

in the presence of her children, and frequently threatened to drive them away from home, and did finally drive his wife from home: *Whitacre v. Whitacre*, 64 Mich. 232; *Crichton v. Crichton*, 73 Wis. 59; *Segour v. Segour*, 23 Neb. 306; *Lyle v. Lyle*, 86 Tenn. 372. But no divorce can properly be granted, where it appears that each party has been guilty of an offense which under the statute is a ground for divorce: *Pease v. Pease*, 72 Wis. 136; *Potter v. Potter*, 75 Iowa, 211. A divorce cannot be granted on the ground of inhuman treatment, where the evidence discloses only an unhappy state of affairs produced by excitable tempers and caustic tongues, irritated and urged on by the presence of an unwelcome mother-in-law: *Maben v. Maben*, 72 Iowa, 658.

GRISWOLD v. GEBBIE.

[126 PENNSYLVANIA STATE, 362.]

FRAUD. — IN ACTION OF DECEIT, SCIENTER MUST NOT ONLY BE ALLEGED, BUT PROVED; and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. But the plaintiff in such action has made out a *prima facie* case, without direct proof of deceitful intent, when he has proved that the defendant made a positive statement of a material fact, its falsity, and the circumstances under which it was made, tending to show a reckless assertion in conscious ignorance of the fact.

PRINCIPAL AND AGENT. — IT IS WELL SETTLED THAT A PRINCIPAL IS RESPONSIBLE for the misrepresentations of his agent, within his authority; and the better opinion is, that, as to third parties affected by the agent's acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern.

FRAUD. — MERE MISSTATEMENT OF QUANTITY OF LAND SOLD IS NOT SUFFICIENT TO PROVE FRAUD; but where the deficiency is very great, and the misstatement is made by advertisement and by descriptive circular, and is repeated twice orally in response to the direct questions of the intended purchaser, and is unexplained by the agent making it, there is a *prima facie* case to go to the jury, though the principal was absolutely ignorant on the subject.

EVIDENCE — EXPERT TESTIMONY. — Where land is claimed to have been sold as a whole, but there is evidence that, in arriving at the price, the parties had considered the acreage, the value per acre is then relevant; and a real estate broker, of many years' experience in the general business, and having a specific knowledge of values in the immediate neighborhood of the property in dispute, is competent to testify as an expert, and his opinion as to the value per acre of the land is admissible.

ACTION on the case by George Gebbie and Mary J. Gebbie, his wife, in right of said wife, against Eliza T. Griswold. It appeared that the defendant owned a country place in her own right, which she desired to sell. Her brother-in-law, John W. Griswold, acting as her agent, called upon one Everly, a real estate broker, and placed the property in his hands for

sale, at the same time giving Everly a circular and advertisement describing the property as containing seven acres, with instructions to insert the advertisement in the city papers, and exhibit the circular to any one who might call with a view to purchase. The plaintiff Gebbie read the advertisement, and called on Everly, who showed him the circular, and told him to go and see the property. Gebbie and his wife went accordingly, and there met John W. Griswold, who showed them over the place, and assured them both, in answer to inquiries on their part, that the property was "rather over than under seven acres." They purchased the property, in reliance upon Griswold's statement, but afterwards discovered that they had been misled, and that the place consisted of but little more than four acres. An action of deceit was then brought against Mrs. Griswold for the misrepresentation of her agent. A witness for the plaintiffs testified that Mrs. Griswold admitted having seen the circular, and given it to parties who talked about buying the property, but it did not appear that she authorized the preparation of the circular. Everly was called by the plaintiffs to testify as an expert to the value of the land; and he stated, in his preliminary examination, that he had been in the real estate business for sixteen years, and had bought and sold a large amount of real estate, and was familiar, from his knowledge of the trade, of the value of real estate in the neighborhood of the property in dispute. His opinion as to the market value of the land per acre was admitted in evidence. Other facts appear in the opinion. The jury found a verdict in favor of the plaintiffs, and the defendant assigned error.

Richard C. Dale and John C. Bullitt, for the plaintiff in error.

Rufus E. Shapley and Ellis Ames Ballard, for the defendants in error.

MITCHELL, J. There can be no question at this date that in an action of deceit the *scienter* must not only be alleged, but proved, and the jury must be satisfied that the defendant made a statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. This is the general rule, and it has been declared with notable emphasis in several recent cases in this state: *Dilworth v. Bradner*, 85 Pa. St. 238; *Duff v. Williams*, 85 Id. 490; *McCandless v. Young*, 96 Id. 289; *Hexter v. Bast*, 125 Id. 52; 9 Am. St. Rep. 874.

If, therefore, the learned judge at the trial had been stating the general rule, his language to the jury, "Did Mr. Griswold state what he did not know to be true, and what was in fact false, without having any reasonable ground for believing it?" would have been open to the objections so forcibly made against it by the learned counsel for the plaintiff in error. But the judge was not defining the rule in general, but stating so much of it and in such manner as applied to the case before the jury. Thus he drops out entirely the first branch of the rule, did the party state what he knew to be false, because there was no evidence, nor was it charged, that Griswold had made a deliberate and intentional misstatement. The *gravamen* of the case was that he had, with a recklessness equivalent to fraud, made a positive statement of a material fact, when he had no knowledge on the subject. Plaintiff had proved that the statement was made, and was in fact untrue. Defendant had given evidence as to her innocence of the misrepresentations, but John Griswold had not been called to state his knowledge or belief, or explain his representations. In this state of the evidence, the judge submitted to the jury whether Griswold had any reasonable ground for believing his statement to be true, or in other words, could the jury find, from the circumstances as shown by the evidence, any ground to suppose that Griswold did so believe. The language was a fair statement of so much of the general rule as applied to the evidence then before the jury. As it is well stated by the learned judge in his opinion on the rule for a new trial, "Had John Griswold been put on the stand to vindicate his good faith, and state the grounds of his belief, or show how he came to believe, in the absence of information, . . . it might have been proper to instruct the jury that whether the causes which influenced his mind were or were not reasonable, or such as they could approve, still if he acted in good faith and expressed a sincere opinion, he should not be found guilty of fraud. But as the case actually stood, such an instruction would have tended to mislead, by raising an issue for which there was no foundation in the evidence."

It is argued here that the evidence was not sufficient to sustain the action, and that a verdict should have been directed for defendant, as asked by a point submitted at the trial. In support of this view, it is said that plaintiff has only proved an erroneous statement, with no direct proof of deceitful intent. But plaintiff had proved the statement, its falsity, and the cir

cumstances under which it was made, tending to show a reckless assertion in entire ignorance of the fact. What more was necessary to make out a *prima facie* case, or could ordinarily be proved? Fraud and intent to deceive do not proclaim themselves openly, nor can they usually be proved by direct evidence. A man who is shown to have made a false statement, from the consequences of which he will be relieved if he honestly believed it to be true, even on insufficient grounds, should at least be charged with the burden of showing that he did have such belief.

A mere misstatement of the amount of land, as said by Sharswood, J., in *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750, is not sufficient to prove fraud, but, as said in the same case, if the deficiency is very great in proportion to the whole, it is evidence of fraud; and where, as here, the misstatement is made by advertisement, and by descriptive circular, is repeated at least twice orally in response to the direct question of the intended purchaser, and is altogether unexplained by the person making it, though his principal and those connected with him in the transaction are shown to have been absolutely ignorant on the subject, we cannot say that there was not a *prima facie* case to go to the jury.

The point that the plaintiff in error was not liable for the statements of her agent, John Griswold, is not tenable. The general rule that a principal is responsible for the misrepresentations of his agent, within his authority, is beyond question; and the better opinion is, that as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world in the present day is transacted, and the rule should be enforced in a liberal spirit, with regard to the actual habits of the community. That an agent who is empowered to engage a real estate broker to make sale of a country seat is thereby authorized to give the broker a description of the place, including its acreage, is so clear that the learned judge would have been justified in submitting the point to the jury in terms much stronger against the defendant below than he did. But the question does not really arise, as there was testimony not only that the defendant knew of the preparation of the circular by her agent, but also that she had herself given it to parties who inquired about the property. Under this evidence the jury could hardly

fail to find that, whether it was within the agent's original authority or not, she had ratified his action.

The remaining assignments of error were not pressed at the argument, but may be briefly noticed. The evidence of the value of the land by the acre is objected to, because the place is claimed to have been sold as a whole. But there was evidence that in arriving at a price, the quantity of the land was one of the elements of the calculation, and upon this view of the case, which was plaintiff's contention, the value per acre was certainly relevant.

The objection to Mr. Everly as an expert on the value of real estate can hardly be made seriously. His testimony shows not only a very large and widely extended experience in the general business, but also as much specific knowledge of values in the immediate neighborhood of this property as could be reasonably looked for, in regard to any suburban district of the same character.

We have given this case a very careful examination, not only because it was due to the exceptionally strong and earnest argument of the very able counsel for the plaintiff in error, but also because it is, in some sense, a hardship on the plaintiff in error, who is conceded to have been personally entirely free from any intentional wrong in the matter. Even her agent, John Griswold, who made the trouble, may not have had any actual intent to deceive, but he was shown to have made an apparently reckless statement of a fact of which he had no knowledge. An explanation from him might have turned the verdict, and it is the plaintiff in error's misfortune that he was not called at the trial, to make such explanation if he had it to make. The case, as a whole, was a very close case, in which the jury might have found for either party without being demonstrably wrong, but if they did in fact make a mistake, it was for the learned judge who tried the cause to correct it, not for us. There was no error of law in the trial, and beyond that we are not authorized to look.

Judgment affirmed.

FRAUD. — IN ACTIONS OF DECEIT, THE CHARGE OF FRAUDULENT INTENT IS MAINTAINED by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge. In such case, it is not necessary to make any further proof of an actual intent to deceive: *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727, and note 730; *Lewark v. Carter*, 10 Am. St. Rep. 45, note.

FALSE REPRESENTATIONS ON SALE OF LAND. — A vendor of land, to induce the sale, stated the quantity as of his own knowledge, and the vendee, relying on such statement, purchased. The statement was untrue, though believed by the vendor to be true. In such case, the vendor, in representing as a fact that as to which he only had a belief, was guilty of fraud, and liable to the vendee for the damage sustained: *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313.

PRINCIPAL IS LIABLE FOR TORTS OF HIS AGENT, within the scope of his employment, though they were not known or approved by the principal: *Little Pittsburg Mining Co. v. Little Chief Mining Co.*, 11 Col. 223; 7 Am. St. Rep. 226, and cases collected in note 246.

ADMISSIBILITY IN EVIDENCE OF OPINION OF WITNESS AS TO VALUE: *Johson v. Thompson*, 72 Ind. 167; 37 Am. Rep. 152; *Printz v. People*, 42 Mich. 144; 36 Am. Rep. 437. The opinion of a witness as to the value of land in controversy is properly excluded, where the only evidence of his being qualified to express an opinion is his own statement that he knew the value, and was competent to state it: *Flint v. Flint*, 6 Allen, 34; 83 Am. Dec. 615.

FRAUD — PLEADING. — A complaint to set aside a conveyance as fraudulent against creditors must allege that the conveyance was made with intent to defraud: *Hays v. Montgomery*, 118 Ind. 91. A complaint to recover damages for fraud and deceit in the sale of a newspaper must allege that plaintiff relied upon the false representations made as an inducement to the sale: *White v. Smith*, 39 Kan. 752.

PRINCIPAL AND AGENT — LIABILITY OF PRINCIPAL FOR ACTS OF AGENT. — A principal is bound by the false and fraudulent representations of his agent, — 1. When made in the general scope of the agent's authority; 2. When not made within the general scope of his authority, but subsequently ratified by the principal: *Du Souchet v. Dutcher*, 113 Ind. 249. But when a principal adopts the acts of his agent by way of a ratification thereof, he must adopt such acts as a whole, and cannot ratify that which is beneficial, and reject that which is not: *Rogers v. Emptie etc. Co.*, 24 Neb. 653. Declarations and representations of an agent, making a sale of personalty, as to its quality, etc., are binding upon the principal: *Aultman etc. Co. v. York*, 71 Tex. 261. Yet the general rule is, that an agent acting beyond the scope of his authority cannot bind his principal: *Fore v. Campbell*, 82 Va. 808. Special agent, appointed to do a particular thing, cannot bind his principal unless he pursues his authority strictly: *Milne v. Kleb*, 44 N. J. Eq. 378; *Stovall v. Commonwealth*, 84 Va. 246; *Vessel etc. Co. v. Taylor*, 126 Ill. 250.

BARTON v. BENSON.

[126 PENNSYLVANIA STATE, 431.]

CONTRACTS — CONTRACT BETWEEN TWO LIEN CREDITORS WHEREBY ONE OF THEM IS DEBARRED FROM BIDDING at an orphans' court sale of real property, the arrangement being entered into unknown to the heirs of the decedent, is against public policy, and void, although the property was not worth the liens against it.

ACTION of *assumpsit* brought by T. W. Barton against William Benson to recover the amount of a judgment which the

plaintiff alleged the defendant had agreed to pay. Both parties to the action were judgment creditors of James F. Benson, deceased, who died leaving a widow and a family of children, and owning certain real estate. An order of the orphans' court to sell the real estate for the payment of debts was procured by the administratrix, and the plaintiff alleged that on the day of the sale the defendant attended, and that the plaintiff sent his agent to attend in his interest; that the defendant there agreed with said agent that if he would not bid the property up to an amount sufficient to cover the plaintiff's judgment, the defendant would pay said judgment in full; that the agent accordingly refrained from bidding, and the property was struck off to the defendant, and thereafter the sale was confirmed to him, and a deed was made in pursuance thereof; that the defendant refused to pay the amount of the plaintiff's judgment in accordance with said alleged agreement, and this action was brought to recover thereon. Other facts appear in the opinion. The jury returned a verdict for the defendant, as instructed by the court, and the plaintiff assigned error.

E. L. Whittelsey, for the plaintiff in error.

William Benson, for the defendant in error.

By COURT. The court below correctly held that the contract declared upon was against public policy, and therefore void. It is true, a somewhat similar contract was sustained in *Maffet v. Ijams*, 103 Pa. St. 266. In that case, however, it appeared affirmatively that the agreement was known and assented to by the defendant in the execution, and all the lien creditors who were or could be affected by it. In the case in hand, the defendant was dead, and he could not of course assent or dissent. But his heirs stood in his shoes, and there was no evidence that they ever knew of the arrangement. It is true, it was alleged that the property was not worth the liens, and no one could have been injured. We cannot sustain the agreement upon this narrow ground. The allegation may be true, but it would introduce an uncertain element into judicial sales were we to sustain such an agreement upon the ground that the property was not worth the liens. As a general rule, the defendant in an execution, or those who stand in his place, have an interest in making the property bring its full value. Hence an agreement by which persons are debarred from bidding must have the sanction of the defendant.

In *Slingluff v. Eckel*, 24 Id. 472, it was held that an agreement at sheriff's sale of real estate to pay the judgment of another, if the latter would not bid, the former being permitted to purchase the property at the sale, was fraudulent as to the debtor or his creditors, and could not be enforced by suit.

Judgment affirmed.

CONTRACTS. — AGREEMENT AMONG BIDDERS FOR PUBLIC WORK, where the intent, effect, or necessary tendency of the contract is to stifle fair competition at the letting, is against public policy, and void: *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep. 706; *Atcheson v. Mallon*, 43 N. Y. 147; 3 Am. Rep. 678; *King v. Winants*, 71 N. C. 469; 17 Am. Rep. 11, and note 15; compare *Breslin v. Brown*, 24 Ohio St. 565; 15 Am. Rep. 627.

AGREEMENT AMONG SEVERAL WHEREBY ONE IS TO BUY LAND about to be offered at sheriff's sale for the benefit of all the parties to the contract, each furnishing his proportion of the money to the buyer, is void, as against public policy, if made to prevent fair competition in bidding, or for other fraudulent purpose: *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134. So a contract between two creditors interested in a public sale about to be made by an assignee in bankruptcy that one will not bid against the other, and in consideration thereof that the latter will pay to the former a certain sum of money, is against public policy, and null and void: *Dudley v. Odom*, 5 S. C. 131; 22 Am. Rep. 6. It was, however, held that an oral agreement that one of two joint mortgagees of personal property shall buy it at judicial sale, the other not attending nor bidding, and shall hold, use, and dispose of it for the benefit of both, is not within the statute of frauds, nor against public policy: *Hunt v. Elliot*, 80 Ind. 245; 41 Am. Rep. 794. And parties may lawfully associate to buy property at public sale, there being no corrupt bargain or combination among them for the purpose of preventing a fair competition among bidders, nor any fraudulent purpose on their part in the transaction: *Smith v. Ulman*, 58 Md. 183; 42 Am. Rep. 329.

PENNSYLVANIA R. R. Co. v. AMERICAN OIL WORKS.

[126 PENNSYLVANIA STATE, 485.]

SALES — STOPPAGE IN TRANSITU — CARRIER'S LIEN. — Exercise of the right of stoppage *in transitu* by the vendor of goods is not a rescission of the contract of sale, but a resumption of possession which enables him to insist upon the vendor's lien which he had waived by the delivery to the carrier. In such case the carrier may, as against the consignor, retain the goods by virtue of his lien for carriage, until his charges and expenses between the consignment and stoppage are paid, but he cannot claim a lien thereon for a general balance due by the consignee for the carriage of former consignments from the same vendor.

BILLS OF LADING — EXTENT OF CARRIER'S LIEN. — Goods were shipped under a bill of lading containing a clause as follows: "Said merchandise may be retained for all arrearages of freight and charges due thereon,

and also on any other goods by the same consignee or owner; and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid." In such case, the consignor having exercised his right of stoppage *in transitu*, and not being a debtor for previous carriage, the carrier's lien did not extend beyond the charges applicable to the goods stopped, and on payment or tender of such charges the consignor was entitled to a delivery of the goods to him.

ACTION by the American Oil Works, Limited, against the Pennsylvania Railroad Company. The plaintiff shipped goods over the defendant's road, and the defendant claimed a lien thereon for freight and charges. The right of the defendant to assert such claim was disputed by the plaintiff, and a case was stated for the judgment of the court. The material facts appear in the opinion. Judgment was entered for the plaintiff, and the defendant assigned error.

David W. Sellers, for the plaintiff in error.

Charles A. Chase, Thomas W. Barlow, and Charles C. Lister, for the defendant in error.

WILLIAMS, J. A vendor of goods has a right to retain them in his own possession until the price has been paid. If he waives this right, and sells upon credit, it is an implied condition of such sale that the buyer shall continue in good credit until the goods come into his actual possession. When that happens, the lien of the vendor is gone, and he must depend upon the ultimate solvency of his customer at the expiration of the term of credit. If, while the goods are in the hands of the carrier, in transit, or in store at the end of the journey, with no intervening right in the way, the buyer becomes insolvent, the implied condition on which credit was given is broken, and the vendor may resume the possession of the goods. The exercise of this right of stoppage is not a rescission of the contract of sale, as the court below seemed to think, but a resumption of possession which enables the seller to insist on his lien as a vendor which he had waived by the delivery to the carrier: *Patten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479; 2 Benjamin on Sales, sec. 1295. The parties are then in the same position as before the seller parted with the possession by delivery to the carrier.

So far the law is well settled. The seller, having exercised his right of stoppage as against the buyer, has then to consider his relation to the carrier. The goods having been delivered into the possession of the carrier, he may retain them by virtue

of his lien for carriage until his charges and expenses are paid. As between the carrier and the consignee who is owner, we see no reason why this lien may not be extended by a contract to cover a general balance due by the consignee for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he honestly owed, before allowing him to remove the goods from the possession of his creditor, whether that creditor was a natural or an artificial person.

But that question is not raised in this case, for the goods never came to the end of the journey, where the rights of the consignee and the carrier could be adjusted. The seller intervened and exercised his right of stoppage. This restored the possession to him, subject to the charges of the carrier for his services and expenses between the consignment and the stoppage. For these charges, the carrier had a lien which was not divested by the stoppage, and which could be asserted against the seller notwithstanding his exercise of that right: *Hays v. Mouille*, 14 Pa. St. 48. But as between the carrier and the seller, there was no balance of accounts for carriage of former consignments; for the delivery of the goods to the consignee without payment of the freight was a voluntary surrender of the lien upon them, and the security which the lien afforded. The carrier by such delivery gave credit to the consignee, and undertook to look to his solvency and integrity. The former bills were therefore paid so far as the consignor was concerned, and the carrier had no legal or moral ground for calling upon him to pay any balances due upon them.

The clause in the bill of lading which has been brought to our attention, and on which the plaintiff in error relies, is not, according to its own terms, applicable to a case like the present one. That clause provides that the consignee or owner shall pay the freight on the goods consigned to him at the time of their delivery, and that the goods may be retained by the carrier for the charges due thereon, and also for any charges due from him for other goods. As there was no carriage of these goods to the consignee, the special lien provided for could not attach to them. When the consignor exercised his right of stoppage, the goods were deliverable to him, and the carrier's right of detention depended on the relations thus created. If the consignor was not debtor for previous carriage, and had not contracted that these goods might be retained from him for such debt, then the carrier's lien did not extend

beyond the charges applicable to the goods stopped, and on payment or tender of these, he was entitled to a delivery of the goods. If the right of the carrier to extend its lien by contract with the owner to the general balance due from such owner be conceded, as it may be, still the lien is confined to the goods of such owner. The goods, which, by the exercise of the right of stoppage, became those of the consignor, cannot be made subject to a lien for the debt of the consignee. We concur in the conclusion reached by the court below, although we reach it by a somewhat different route.

The judgment is affirmed.

SALES—RIGHT OF STOPPAGE IN TRANSITU: *Tytle v. Sylvester*, 79 Me. 212; 1 Am. St. Rep. 303, and note 305.

COMMON CARRIER HAS LIEN UPON GOODS TRANSPORTED by him, and a right to retain their possession, as against the general owner, until his reasonable charges are paid: *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271; *Galena etc. R. R. Co. v. Roe*, 18 Ill. 488; 68 Am. Dec. 574. If the carrier has delivered part of the goods carried without collecting his freight, he does not thereby, as matter of law, lose his lien for that freight, as against the part undelivered: *New Haven and N. Co. v. Campbell*, 128 Mass. 104; 35 Am. Rep. 360; even as against the consignor's right of stoppage in transitu: *Potts v. New York etc. R. R. Co.*, 131 Mass. 455; 41 Am. Rep. 247. But a common carrier cannot detain goods received for transportation under a bill of lading for a debt due to himself not connected with the carriage: *Pharr v. Collins*, 35 La. Ann. 939; 48 Am. Rep. 251. And a carrier who wrongfully sells goods to enforce his lien thereon for freight is guilty of a conversion: *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246; 63 Am. Dec. 626. Where a common carrier by water, after landing goods at the wharf in the city to which they are consigned, voluntarily assumes the delivery of them to the consignee at his place of business, no lien for cartage arises: *Richardson v. Rich*, 104 Mass. 156; 6 Am. Rep. 210.

JENSEN v. PERRY.

[120 PENNSYLVANIA STATE, 488.]

CONTRACT WHEREIN PRINCIPAL AGREED TO FURNISH SUFFICIENT SAMPLES TO AGENT, CONSTRUCTION OF.—A written contract entered into between principal and agent, whereby the latter was to sell a certain article, contained a provision by which the principal agreed to furnish the agent with sufficient samples of the article, and printed matter in the nature of advertisements relating thereto, as the same might be called for by the agent. Under this provision, the employer was not bound to submit to an unreasonable and unconscionable demand by his agent for samples, and what was a reasonable quantity, if the parties failed to agree about it, was a question of fact for the jury, and not to be determined by the agent alone.

ACTION by John C. Perry against Dr. C. L. Jensen to recover damages for the breach of a written contract. The facts appear in the opinion. The jury found a verdict for the plaintiff, and a rule for a new trial having been discharged, judgment was entered. The defendant having died, his death was suggested on the record, and Anna M. Jensen, his administratrix, was substituted, and assigned error.

William F. Johnson and F. Carroll Brewster, for the plaintiff in error.

William S. Stenger, for the defendant in error.

WILLIAMS, J. The contract sued on in this case made Perry the "sole and exclusive agent" for the introduction of Dr. Jensen's Crystal Pepsin to the people of the United States. It defined the powers and duties of the agent, fixed his compensation, and contained, *inter alia*, the following stipulation: "Said Jensen agrees to supply said Perry with sufficient samples of his said article, and printed matter in the nature of advertisements relating thereto, as may be called for by said Perry."

This contract was made in November, 1855. Operations were begun under it by Perry about the 1st of February, 1886. By the 1st of June, or within about four months, Perry had called for and been provided with 431,621 sample-bottles containing an average of nine tablets each of Dr. Jensen's Crystal Pepsin, worth at the ordinary selling price \$81,794. In August of the same year, Perry wrote to Dr. Jensen: "I want 100,000 samples immediately, and will want several hundred thousand more by October 15th. The distribution will be immediate. Please send at once to office." Dr. Jensen thought this demand was unreasonable. He insisted that he had already furnished more than a sufficient quantity of samples for the work done and doing by Perry, and declined to furnish the samples demanded. Perry treated this as a violation of contract, suspended the enterprise of introducing the Crystal Pepsin to the people of the United States, and brought this action to recover damages.

On the trial, the defendant offered to prove that the quantity of samples which he had furnished prior to the demand in August, 1886, was more than reasonably sufficient for the whole year's operations. This offer was rejected by the court upon an interpretation of the contract which is fully stated in the charge to the jury. The learned judge said: "The defend-

ant agreed to furnish samples to the plaintiff, whatever he should require and as he required them." In other words, he held that the agreement to furnish "sufficient samples" meant that Jensen should furnish whatever Perry might choose to require of him, without regard to the business actually done, to the usages of the trade, or the judgment of a jury. If this is correct, Dr. Jensen certainly made a very unequal and unfortunate contract with his agent. Upon this view of it, his liability has no bounds, except such as the agent may set. He cannot say that his agent is unreasonable or oppressive. He cannot ask a jury to say so. He has only to furnish whatever the agent demands of him.

We cannot agree to this exposition of the contract. The agent may demand what is fairly and reasonably sufficient for the purposes of his undertaking, and no more. He is bound to exercise good faith towards his principal. If he fails to do this, or if he makes unnecessary and oppressive demands upon him, he violates the contract, and becomes himself a wrong doer. The employer is not bound to submit to an unreasonable and unconscionable demand by his agent, nor is the question what is reasonable and conscionable to be determined by the interested and unfaithful agent alone. What is a reasonable quantity of samples for the purposes of the contract, is, if the parties cannot agree about it, a question of fact to be settled by a jury. The offer made in the court below by Dr. Jensen to show that the demand made upon him was unreasonable and oppressive, and that he had furnished, before it was made, a larger quantity of samples than was reasonably sufficient for the whole year's operations by his agent, if those operations had been conducted with businesslike methods and with fairness towards him, should have been admitted.

The first, second, fifth, seventh, and eighth assignments of error are sustained.

The judgment is reversed, and a *venire facias de novo* awarded.

CONTRACTS — REASONABLENESS OF DEMAND. — In an action by a broker to recover moneys advanced to complete his contract of sales made for his principal, the question whether the demands of the broker for margins were reasonable is a question of fact to be determined by the jury from the statements in the written demand, and their context, and from a consideration of all the surrounding circumstances: *Perin v. Parker*, 126 Ill. 201; 9 Am. St. Rep. 571. And see, as to when the interpretation of a contract should be submitted to the jury, *Coquillard v. Hovey*, 23 Neb. 622; 8 Am. St. Rep. 134, and note 140.

CROSLAND v. POTTSVILLE BOROUGH.

[126 PENNSYLVANIA STATE, 511.]

NUISANCES, ABATEMENT OF — RESPONSIBILITY ASSUMED. — PERSON WHO UNDERTAKES TO ABATE NUISANCE PROCEEDS AT HIS PERIL, and takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment, he is answerable in damages; and if a breach of the peace is involved, he is liable to indictment for the result.

NUISANCES, TO WHAT EXTENT RIGHT TO ABATE MAY BE EXERCISED. — When a person who is entitled to a limited right exercises it in excess so as to produce a nuisance, it may be abated to the extent of the excess. But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be stopped entirely, until means have been taken to reduce it within its proper limits.

NUISANCES — RIGHT OF LOT-OWNER IN BOROUGH TO ABATE NUISANCE ARISING FROM UNLAWFUL MAINTENANCE OF SEWER DRAIN THROUGH HIS PREMISES. — The plaintiff, owning a lot in a borough, gave to a lot-owner across the street a license to conduct the surface-water from his premises through a drain, passing under the street and through the plaintiff's lot to a certain stream. The licensee abused the privilege granted by using the drain as a channel for noxious and offensive matter instead of surface-water, thereby creating a nuisance to the injury of the plaintiff's dwelling-houses; whereupon the plaintiff disconnected the drain, and stopped it at his curb-line. The offensive matter then overflowed into and upon the street, when the borough authorities, at the instance of the licensee, opened up the drain, and reconnected it with the plaintiff's premises. The plaintiff was present, and resisted the workmen, and was arrested by the police, and imprisoned in the lockup. In such case, the plaintiff had a right, after due notice, and creating no breach of the peace, to abate this nuisance. The borough authorities had no right to reconstruct the drain so as to again throw its contents upon the plaintiff's premises, and their attempt to do so was wholly without authority; and in an action by the plaintiff against the borough to recover damages for the injury and for his arrest, it was error to submit the case to the jury with binding instructions to find for the defendant.

ACTION in case brought by John M. Crosland against the borough of Pottsville. The material facts appear in the head-note and in the opinion. The jury found a verdict for the defendant, as directed by the court, and the plaintiff assigned error.

J. W. Moyer, John W. Ryon, and W. F. Shepherd, for the plaintiff in error.

R. H. Koch, for the defendant in error.

CLARK, J. After the argument of this case, it was assigned to our late brother Trunkey for an opinion. After his death,

the reassignment of it was overlooked, and hence the delay in entering judgment.

We will not enter into any extended discussion of the case, but will briefly state the grounds for the judgment we now enter. As the jury received binding instructions to find for the defendant, the testimony adduced by the plaintiff, with all reasonable inferences to be drawn therefrom, must be taken as establishing the true theory of the case on the facts.

We assume, therefore, that Crosland gave to Colonel Brown the right to conduct the surface-water only from his premises through this drain into the Schuylkill River; that after the drain-pipes were put down he turned into it the foul matter which came from his cess-pool and privy-vaults, and that he sold a similar privilege to others; that thereby the drain, instead of being used to conduct the surface and mountain water, as originally intended, was converted into a common sewer which caused the plaintiff's house to be untenable, and it is believed unhealthy, and thus became a nuisance which the plaintiff claimed the right to abate. There is testimony, also, that the privilege given to Brown was experimental merely; if it should prove unsatisfactory, Crosland says, he had the right at any time to terminate it. The privilege must be treated, therefore, as a mere license which it was in Crosland's power to revoke at his pleasure. It must be assumed, also, that the persons who were employed to adjust these pipes, and who reconstructed the sewer so as to again throw its contents upon the plaintiff's premises, were acting under authority from the borough, and were directed to do just what was done, and that the borough was responsible for these acts. There is abundant testimony to justify this inference, no matter what the facts may have been.

The drain was put down by Brown, for his own convenience; the borough had nothing to do with it, but as it was laid in the street, and suffered to remain, and the borough exercised its authority to maintain it, we may infer that it was originally placed there by permission, or that its construction was afterwards assented to. Nor had Crosland anything to do with the drain beyond yielding his assent that it might be laid in his lots, to lead from the street to the river, and to conduct the surface-water. It conferred only a limited right.

When a person who is entitled to a limited right exercises it in excess so as to produce a nuisance, it may be abated to the extent of the excess: *Barclay v. Commonwealth*, 25 Pa. St. 508;

64 Am. Dec. 715; *Taggart v. Commonwealth*, 21 Pa. St. 527. But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits: Wood on Nuisances, 804; Addison on Torts, 269; *Cawkwell v. Russell*, 26 L. J. Ex. 34; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693. If Brown abused the privileges which had been given him, by using these pipes as a channel for noxious and offensive matter, instead of surface-water, and thereby created a nuisance, Crosland had an undoubted right, after due notice, to go either upon the premises of Brown, or on his own premises, and abate the nuisance by stopping up the drain, thereby preventing even the surface-water from flowing therein, until Brown reduced his use thereof within the proper limits. Of course a person who undertakes to abate a nuisance proceeds at his peril; he takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment, he is answerable in damages, and if a breach of the peace is involved, he is liable to indictment for the result.

But creating no breach of the peace, he had a right to abate this nuisance. The noxious matter which passed through the drain under the road came from Brown's premises; it was his (Brown's) duty to convey it to the river, or to some other place where it would not become offensive and injurious to the public, and when he received notice that the drain was obstructed, it was his duty to stop the flow. It was not an unlawful obstruction of the drain which caused the public nuisance; it was the continued use of the drain by Brown after he knew it was obstructed that caused the overflow into and upon the highway, and for this Brown was responsible. Brown's recourse, if he had any, was upon Crosland; he had no right to discharge the sewer into the street. The borough authorities of Pottsville had no more right to open up the sewer through Crosland's property than Brown had; their attempt to do so was wholly without authority, and in denial of the legal rights of Crosland, who had a clear right in a lawful and peaceable manner to protect his property against the unlawful use of this drain by Brown, and against the unlawful acts of any other person who might come to aid in perpetrating this wrong upon him. Brown was the offending party, and the officers of the borough should have given their attention to him; they should have obliged him to abate the public nuisance which he had set up and was steadily maintaining.

We decide this case upon the force and effect of the plaintiff's testimony, adopting his theory of the case as the correct one. When it comes to be tried again, and the evidence on both sides is submitted to the jury, the case may be presented in an entirely different light. The court erred, we think, in submitting the case to the jury with binding instructions to find for the defendant.

The judgment is reversed, and a *venire facias de novo* awarded.

NUISANCES. — PRIVATE CITIZEN CAN ONLY ABATE PUBLIC NUISANCE when it becomes an obstruction to the exercise of his private right: *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794; and see *Tissot v. Great Southern Tel. etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248, and cases collected in note 256.

NUISANCE, WHETHER PUBLIC OR PRIVATE, MAY BE ABATED at common law by the party aggrieved, if done without breach of the peace: *Stiles v. Laird*, 5 Cal. 120; 63 Am. Dec. 110, and note 113; *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444. But a party who assumes that something is a nuisance, and undertakes to abate it as such, does so under the peril of being deemed a trespasser if he fails to establish the existence of the nuisance: *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536.

LICENSE CANNOT JUSTIFY ACTS BEYOND ITS TERMS, and those terms will not be strained beyond a fair and reasonable interpretation: *Wheelock v. Neenan*, 108 N. Y. 179; 2 Am. St. Rep. 405.

COMMONWEALTH v. GREEN.

[126 PENNSYLVANIA STATE, 581.]

CRIMINAL LAW. — **PRESENTMENT, PROPERLY SPEAKING,** is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth.

CRIMINAL LAW. — **GRAND JURY MAY ACT UPON AND MAKE PRESENTMENT OF ONLY SUCH OFFENSES** as are of public notoriety, and within their own knowledge, such as nuisances, seditious, etc., or such as are given to them in charge by the court, or by the prosecuting attorney; but in no other cases, without a previous examination of the accused before a magistrate.

CRIMINAL LAW — **QUASHING INDICTMENT.** — **BILL OF INDICTMENT FOR KEEPING COMMON BAWDY-HOUSE**, sent before the grand jury by the district attorney, by leave of court, and based upon a presentment made by the grand jury, not upon their knowledge and observation, but upon the testimony of certain witnesses examined before them upon a charge of assault and battery against another defendant, will be quashed on motion.

CRIMINAL LAW — QUASHING INDICTMENT — EVIDENCE. — ON HEARING OF MOTION TO QUASH INDICTMENT FOR KEEPING BAWDY-HOUSE, upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, but upon the testimony of witnesses taken before them on another complaint, a member of the grand jury is a competent witness to testify that that body, in making the presentment, acted upon such testimony, and not upon their own knowledge and observation. In such case, if the testimony of the grand juror is objected to, and the objection is overruled and an exception sealed, the question of admissibility of the testimony is properly brought upon the record, under Pennsylvania act of May 19, 1874, P. L. 219.

THE grand jury made a presentment charging one Lizzie Green with keeping and maintaining a common bawdy-house. The district attorney, by leave of court, sent before the grand jury a bill of indictment based upon this presentment, and a true bill was returned. When the cause was called for trial, the defendant, through her counsel, moved to quash the indictment, upon the ground set out in the opinion, where other material facts also appear. The indictment was quashed, and the district attorney assigned error.

R. C. Stewart, district attorney, for the plaintiff in error.

P. C. Evans, for the defendant in error.

CLARK, J. The indictment in this case was for keeping a disorderly house; it was based upon a presentment of the grand jury, the indictment having been prepared in pursuance thereof, and sent to a subsequent grand jury, with the permission of the court. A rule was taken to quash the indictment, upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, but upon evidence taken before them on another complaint. At the hearing of the rule, a member of the grand jury was called to testify as to what influenced the grand jury in making the presentment; and it appeared that the presentment was made upon the testimony of certain witnesses examined upon a charge of assault and battery against some other person than the present defendant, under investigation by the grand jury, and not from their personal knowledge and observation.

That the grand juror was a competent witness for this purpose cannot be doubted: See *Gordon v. Commonwealth*, 92 Pa. St. 216; 73 Am. Rep. 672, and cases there cited. He did not testify as to his own counsels, or to those of his fellow-jurors, or to any other matters which he was sworn to keep secret,

but merely to the nature of the issue or question under investigation, and to the fact that the jury acted upon the testimony, and not upon their own knowledge or observation, in making the presentment. If such testimony were not admissible, it would be impossible, in most cases, to ascertain the sources of information from which a presentment was made; and although the charge may be wholly groundless, originating in mere popular clamor, or in the malice of an unknown accuser, not only the accused, but the court itself, would be powerless to develop the facts; for the presentment, although made in good faith, may disclose nothing to indicate the source from which the information came. We can discover no rule of evidence, or of public policy, which would exclude the evidence of a grand juror in such case.

We are equally clear that the testimony of the witness was brought upon the record, under the exception taken at the hearing, according to the provision of the first section of the act of May 19, 1874, P. L. 219. The offer of the witness was to establish the matters alleged as grounds for quashing the indictment, and the testimony was in accordance with the offer. The only question is upon the sufficiency of the evidence, and of this there can be no doubt. The fact must, therefore, be taken as established, that the presentment was made upon the testimony of witnesses examined before the grand jury, and not upon the knowledge and observation of the grand jurors.

Criminal actions are usually instituted upon complaint, under oath, before a magistrate or other proper officer, upon which, if it appear that a criminal offense has been committed within the jurisdiction, a warrant is issued, and the defendant arrested and brought before the magistrate for a hearing. If, upon the hearing, there be a probable case of guilt, the prisoner is held for trial in the court having jurisdiction of the offense. Whilst this is the usual method pursued in criminal procedure, there are certain exceptional or extraordinary modes of preferring criminal charges, well recognized in practice. These extraordinary modes of criminal procedure are very fully defined and set forth in the foot-notes to Wharton's Criminal Law, page 458, in a charge of the late Judge King, which has in a number of cases received the approval of this court.

Three exceptions to the general method of procedure are there recognized. The first of these is, "where criminal

courts, of their own motion, call the attention of grand juries to, and direct the investigation of, matters of general public import, which, from their nature and operation in the entire community, justify such intervention." This power of the court, it is said, will only be thus exercised, however, in the investigation of general and public evils, such as great riots, general public nuisances, and flagrant vices; it will not be applied in cases of ordinary crime.

The second exception is, "where the attorney-general, *ex officio*, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused." This power is properly exercised where there is occasion for great haste in applying the machinery of the law, or where the exigencies of the case and the public interests may reasonably require such action to be taken. The procedure in such cases, however, is under the supervision of the court, and if the process and power is misapplied, the court will vindicate itself in restraining its exercise.

The third exception is that which is originated by the presentment of a grand jury. A presentment, properly speaking, says the learned judge, is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. This is the definition given in the law dictionary by Bouvier, and by Blackstone, 4 Bla. Com. 301, and is the definition recognized and adopted by this court.

It is true that in some of the earlier cases in the federal courts, and in some of the states, it has been held that it was within the province and power of the grand jury to call witnesses, and to institute prosecution of their own motion, and the definition given by the late Dr. Wharton is therefore more comprehensive: Wharton's Crim. Law, 212. But he admits that in Pennsylvania the law is now somewhat narrowed: *Id.*, sec. 455; and that the view which may be considered as accepted in the United States courts, and in most of the states, is, that the grand jury may act upon and present only such offenses as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate: *Id.*, sec. 457.

"In this state," says Mr. Justice Agnew, in *McCullough v. Commonwealth*, 67 Pa. St. 33, "the power of the grand jury is

more restricted, and the better opinion is, that they can act only upon, and present offenses of, public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court, and such as are sent up to them by the district attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the bill of rights: 1 Wharton's Crim. Law, ed. 1868, sec. 458, and note. It has therefore been held not to be allowable for individuals to go before the grand jury with their witnesses, and to prefer charges. Such conduct is looked upon as a breach of privilege on part of the grand jury, and as a highly improper act on part of such volunteers. Its effect is to deprive the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for a false and malicious prosecution. It is in violation of the act authorizing the defendant to refuse to plead until the name of a prosecutor be indorsed on the bill of indictment. The usual course where a presentment is thus surreptitiously procured, and bill founded upon it, has been to quash the indictment, on motion, and before plea pleaded."

The presentment, therefore, as a basis for the indictment, was wholly insufficient, for the reason that it was not found by the grand jury upon their own knowledge and observation.

It has been suggested, however, that if the presentment of the grand jury was not authorized by law, it may be treated as a mere suggestion by which the attention of the court was called to the commission of the crime; and that the district attorney having, with leave of the court, sent up an indictment, the proceeding may be sustained under the other exceptions to the usual mode of criminal procedure already specified. As we understand the practice, the presentment of a grand jury is *ex mero motu*, and is rarely, if ever, presented in technical form. "Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill": 2 Hawk. P. C., c. 25, sec. 1; Bouv. Inst. 452. Upon a presentment, the proper officer of the court must frame an indictment, before the party accused can be put to answer it: Story on Constitution, 657; Wharton's Crim. Law, 212.

What was done in this case is just what is done in all cases of a presentment by the grand jury: the presentment was placed in the hands of the district attorney, by the court, with

instructions to put it in the technical form of an indictment, signed by the commonwealth's officer, for the formal action of the grand jury, and upon return thereof, the defendant was liable to process, and was required to plead.

It is certainly true, however, as we have said, that the district attorney in an exigency, or when the occasion seems to require, may prefer an indictment before a grand jury without a previous binding over or commitment, but this power is only to be exercised under the circumstances stated for the public good, and then the proceeding is always under the supervision and control of the court. "In practice," says Judge King, "however, the law officer of the commonwealth always exercises this power cautiously, — generally under the direction of the court, and never unless convinced that the general public good demands it." "It is to be exercised in the ordinary case," says Mr. Justice Woodward, in *Rowand v. Commonwealth*, 82 Pa. St. 405, "under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both manifest and flagrant. Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment, and in such cases it would be the duty of the prosecuting officer to act promptly, and upon his own responsibility. While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity, it is the duty of the quarter sessions to set the officer's act aside."

It is plain that the exigency of this case did not require, or even appear to require, this extraordinary exercise of power, on the part of the district attorney. There was no emergency, no demand of haste, no effort to escape, not even any appearance of an escape; there was no public good to be subserved, indeed there was absolutely nothing to call for this unusual method of procedure, and it is not pretended there was. It is true that in this case the indictment was prepared and sent to the grand jury "with leave of the court," but the court, upon being informed that the presentment was not made upon the knowledge and observation of the grand jury, and was

therefore no presentment at all, had a right to revoke that leave, and to quash the bill, which was done.

It was stated at the argument that the indictment was sent to the grand jury with leave of one judge, whilst the order to quash was made by another judge of the same court; and the suggestion carries with it the intimation that the discretion of the court having been exercised by one judge, it was not an appropriate act of discretion for the other to set the previous action aside. It is sufficient to state, in reply to this, that the record does not disclose the fact that the orders were by different judges of the same court; and it would avail nothing if it did, for this court takes cognizance of the orders, decrees, and judgments of a court of record as such, no matter how for the time being it may be constituted. Although the judges holding it may from time to time differ, it is at all times the same court here. With the amenities and courtesies which may be supposed to be due between judges of the same court, we have nothing to do. But there is not necessarily any conflict of opinion shown upon this record. The sending of the bill to the grand jury was undoubtedly right as the matter then stood, and the order quashing the bill was certainly right when the facts appeared. If the court in the exercise of its discretion had sustained this indictment, and brought the defendant to trial and conviction upon it, it is quite improbable that this court on a writ of error would have disturbed the judgment; it is only for a flagrant abuse of this discretion, as we have said, this court would interfere. But the same court which in the exercise of its discretion directed the indictment to be sent to the grand jury, upon being informed as to the illegality of the presentment, in the exercise of the same discretion, afterwards quashed the bill. We think that discretion was properly exercised, and the proceedings of the quarter sessions are affirmed.

GRAND JURIES — QUALIFICATIONS AND COMPETENCY. — At common law, grand jurors must be good and lawful freeholders, and inhabitants of the county: *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; but the mere fact that one of them does not reside in the precinct where he was supposed to reside, and from which he was drawn, will not, in the absence of bad faith in selecting the grand jury, vitiate an indictment: *Polis v. State*, 14 Neb. 540. Nor will absence from the state for a year on temporary business, without intent to change his domicile, disqualify a grand juror: *State v. Alexander*, 35 La. Ann. 1100. In Arkansas, grand jurors need not be householders nor freeholders: *Gantt's Digest*, sec. 3654; *Palmore v. State*, 29 Ark. 248. In Indiana, they must be freeholders; householders are not competent (*Wills v.*

State, 69 Ind. 286), even though freeholders in another state, the statute providing that "a grand jury shall be composed of six reputable freeholders and residents of the county": Acts 1875, Special Sess. 54; 2 R. S. 1876, p. 417, note 1. The presence of one disqualified person upon the panel invalidates all indictments found: *United States v. Hammond*, 2 Woods, 197; and the defendant is not bound, in North Carolina, to show affirmatively that the disqualified juror was present and participated in the finding, inasmuch as the statute (Battle's Revision, c. 17, sec. 229 g), is absolute and unconditional, and the disqualification created thereby depends on the *status* of the juror in this respect, and that only; and to take advantage of such incompetency, it is incumbent on the accused merely to show that fact by proof. It will be presumed that the disqualified juror was present, and acted with his fellows: *State v. Smith*, 80 N. C. 410, 411; *State v. Lyles*, 77 Id. 496. As a general rule, one who is competent to act as a petit or traverse juror is qualified to serve as a grand juror: *State v. Quimby*, 51 Me. 395. So, also, one who at the opening of the hearing had taken out his first papers only, and became a full citizen after hearing a part of the testimony, and before finding the indictment, is competent to sit as a grand juror, under the Montana Compiled Statutes, sections 120, 1304: *Territory v. Clayton*, 8 Mon. 1. Again, the facts that a man is a Quaker (*Commonwealth v. Smith*, 9 Mass. 107), or a member of a political party, and a strong partisan (*United States v. Egan*, 30 Fed. Rep. 608), or has subscribed money to suppress unlawful liquor-selling, or other crime, will not disqualify him; for zeal displayed in a purpose to put down a certain kind of offense, often repeated, is not a bias against any particular individual: *Koch v. State*, 32 Ohio St. 353. So it is not a good ground of objection that a proposed grand juror is remotely connected with the defendant by marriage: *State v. Maddox*, 1 Lea, 671; or was one of the committing magistrates: *State v. Chairs*, 9 Baxt. 196; or is exempted from serving by statute: *State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Id. 328; as where he had served within two years: *State v. Cox*, 52 Vt. 471. And where the wife of one of the grand jurors who found an indictment against the president of a trust company was a depositor in the company in her own right, it was held that he was not thereby disqualified: *State v. Brainerd*, 56 Id. 532; 48 Am. Rep. 818. In Georgia, persons over sixty years of age are competent, when they consent, to act as grand jurors: *Jackson v. State*, 76 Ga. 551. And in California one is not incompetent to act as such in finding an indictment against a person as to whose guilt he already has an opinion formed from the testimony of such person before the grand jury on inquiry into another offense: *People v. Northey*, 77 Cal. 618. And in Kentucky it is held that an act which provides that only white persons shall serve upon juries is unconstitutional, because the exclusion of negroes from juries on account of their race or color denies them the equal protection of the law, in contravention of the fourteenth article of amendments to the constitution of the United States. This conclusion is based on the ground that a race whose members are excluded from serving on juries is discriminated against as a race, and is not as well protected by the law as the race not so excluded: *Commonwealth v. Wright*, 79 Ky. 22; 42 Am. Rep. 203. But an unqualified opinion of the defendant's guilt disqualifies, even though formed in finding a previous indictment, since quashed, for the same offense: *State v. Gillick*, 7 Iowa, 287. See *State v. Chairs*, 9 Baxt. 196. Where negroes were disqualified by statute, it was held that a white defendant could not complain: *Commonwealth v. Wright*, 79 Ky. 22; 42 Am. Rep. 203.

STATUTES CREATING EXEMPTIONS are never construed to disqualify, but simply to excuse, the persons named. "If they be actually returned, and appear, they can neither be challenged by the party, nor excuse themselves from serving, if there be not a sufficient number without them": Bacon's Abr., tit. Juries, E, 6. In *State v. Forshaer*, 43 N. H. 89, the court said: "By the force of the term 'exempted,' we understand the party without the exemption would be liable to perform the duty. A person disqualified, and therefore incompetent and incapable, cannot be exempted from a duty or a service when the law imposes no such duty or service upon him. Such an exemption is a personal privilege, with which the parties to the cause have no concern, and which furnishes them no cause of challenge, though the court, upon the suggestion made from any quarter that a person returned as a juror was exempted, would ordinarily decline to hold him to a duty to which he is not liable, and would of course excuse him." See also *Fellowes's Case*, 5 Me. 333, where a constable was held competent, though not compellable, to serve as a juror. So it is held that a postmaster and coroner, though exempt, were not disqualified: *State v. Wright*, 53 Id. 328, 344.

SUMMONING AND DRAWING. — In the United States courts, a writ of *venire facias* is indispensable to the summoning of a legal grand jury: *United States v. Ants*, 4 Woods, 174; 16 Fed. Rep. 119; so also in Maine: *State v. Lightbody*, 38 Me. 200; and state practice is followed as nearly as may be: *United States v. Richardson*, 28 Fed. Rep. 61. In Alabama, the power of the legislature is unrestrained by the constitution to declare the mode of summoning and drawing the panel: *Williams v. State*, 61 Ala. 33; but a grand jury organized by the court without authority of law is illegal: *Berry v. State*, 63 Id. 126; S. P. in New York: *People v. Duff*, 1 N. Y. Cr. 307; and the drawing must be in the presence of the officers designated by law: *Billingslea v. State*, 68 Ala. 486; *Phillips v. State*, 68 Id. 469. The personation of an absent juror by another person of the same name is fatal to the panel: *Nixon v. State*, 68 Id. 535; see also *Sylvester v. State*, 72 Id. 201. Whether the officers have judiciously selected a jury list will not be collaterally inquired into: *Green v. State*, 73 Id. 26; and such list may be made up from the body of the county or from a particular vicinage: *Williams v. State*, 61 Id. 33; it may be obtained from the list of the registered voters, or from a list of the householders and freeholders: *Crosse v. State*, 63 Id. 40; Rapalje's Criminal Procedure, sec. 64. The same is the law in Nebraska: *Polin v. State*, 14 Neb. 540.

The omission or erroneous insertion of a middle name or initial in a *venire* of grand jurors is entirely immaterial, as the law recognizes but one christian name, unless it be shown that there is another person within the jurisdiction having the same christian name, — to prove which the defendant has the burden: *Rampey v. State*, 83 Ala. 31. Under Alabama Code, 1886, sec. 4445, providing that no objection can be taken to an indictment on any ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law, the *venire* will not be quashed because, instead of first drawing the names of the grand jurors, a number sufficient for both grand and petit jurors was drawn, and then the grand jury drawn from these: *Murphy v. State*, 86 Ala. 45. The court has undoubted power to authorize the sheriff to amend his return made in executing a *venire* of grand jurors: *Rampey v. State*, *supra*. In California, if the proper officers are present at the drawing, no notice from the clerk is required: *People v. Gallagher*, 55 Cal. 462; and the selection is to be made in the same way as that of petit jurors: *People v. Crowley*, 56 Id. 36. In Dakota, both grand and petit jurors should be summoned from the body of the

district, not exclusively from the county in which the court sits: *United States v. Beebe*, 2 Dak. 292. In Georgia, in order to legalize the drawing of a grand jury in vacation, it is not essential that petit jurors should also be drawn at the same time: *Holman v. State*, 79 Ga. 155. In Louisiana, the jury must be drawn at least fifty days before the beginning of the term: *State v. Smith*, 31 La. Ann. 406. In Massachusetts, a grand jury impaneled as prescribed by statute (Stats. 1875, c. 5) is a valid jury, "notwithstanding any irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, and impaneling," etc.: *Commonwealth v. Brown*, 121 Mass. 69. In Nevada, the selection should be from the "jury list": *State v. Collyer*, 17 Nev. 275. In New Jersey, the panel returned by the sheriff may be amended by the court, or a new one substituted, on the day of its return, and before the presentment of any indictments: *State v. Ricbey*, 9 N. J. L. 293. In New York, two grand juries may sit in one county at the same time: *Allen v. People*, 57 Barb. 338; and where the requisite number of names are selected and drawn from a list made under cover of law, being the only list for the purpose in the county, the panel should not be set aside: *People v. Fitzpatrick*, 1 N. Y. Cr. 425; 30 Hun, 493; see further, as to the practice in that state, *People v. Harriot*, 3 Park. Cr. 112; *People v. Cyphers*, 5 Id. 666; affirmed 31 N. Y. 373; *People v. Petrea*, 92 Id. 128; 65 How. Pr. 59; affirming 64 Id. 139. In South Carolina, where, after a grand jury is summoned to attend on a day named, a statute makes the term begin on a later day, a grand jury attending on such later day is a lawful body: *State v. Jeffcoat*, 26 S. C. 114. In Utah, under the Poland bill, the number of names to be drawn from which to obtain the jury is discretionary with the judge ordering the drawing: *People v. Lee*, 2 Utah, 441. And in Virginia, if one of the forty-eight summoned to serve as grand jurors is incompetent, but his name is not drawn among the sixteen who are actually to serve, the grand jury is a legal one: *Skinn v. Commonwealth*, 32 Gratt. 899; *Rapalje's Criminal Procedure*, sec. 64.

TALESMEN — REASSEMBLING — FILLING THE PANEL. — Where, either on being first assembled, or having been assembled and discharged, on being reassembled by order of court, any or all of the members of a grand jury fail to appear, the court may direct the panel to be filled from by-standers: *Dorman v. State*, 56 Ind. 454; or orally direct the sheriff to summon a sufficient number to complete it: *State v. Miller*, 53 Iowa, 84; the deficiency may be filled either from the list furnished by the county commissioners, by drawing from the box, or from the body of the county: *Jones v. State*, 18 Fla. 889. But it is error to impanel a grand jury from talesmen when members of the regular panel are absent by direction of the court: *State v. Bowman*, 73 Iowa, 110. And if the court orders talesmen to be summoned from an improper class of persons, the error will be fatal to an indictment; not so, however, if the order be correct, and an incompetent person be summoned and accepted: *Oliver v. State*, 66 Ala. 8. To fill a panel, the judge may order the summoning of persons from the body of the county instead of from names still left in the grand-jury box: *Levy v. Wilson*, 69 Cal. 105. The selection of a grand juror by the sheriff, in place of one who has been excused, prior to impaneling those who have been selected by law, and after the others who had appeared have been discharged, is not erroneous: *State v. Gurlagh*, 76 Iowa, 141. The provision of the Iowa statute that a selection by lot shall be made from the number of grand jurors appearing does not apply where only the precise number required to fill the panel appeared after others were excused: *State v. Standley*, 76 Iowa, 215. Ordering the panel to be filled

from the petit jurors summoned, but not impaneled and sworn, though irregular, is not fatal to the proceeding of the grand jury so formed: *Rumels v. State*, 28 Ark. 121. In Alabama, the deficiency must be supplied "from the qualified citizens of the county": Ala. Code, sec. 4754; not "from the by-standers": *Benson v. State*, 68 Ala. 513; *Billingslea v. State*, 68 Id. 486. So also in Mississippi: *Portis v. State*, 23 Miss. 578. See *State v. Symonds*, 36 Me. 128. Where a grand jury, after being duly impaneled, sworn, and charged, are discharged by the court, the court may, in a proper case, lawfully reassemble the same persons, during the same term, to sit as a grand jury: *Wilson v. State*, 32 Tex. 112; compare *State v. McEvoy*, 9 S. C. 208; and if all the original jurors cannot be found, the panel may be filled from the by-standers: *Watts v. Territory*, 1 Wash. 409; or an entirely new jury may be summoned: *State v. Harris*, 73 Mo. 287; *Shinn v. Commonwealth*, 32 Gratt. 899; *Drake v. State*, 14 Neb. 535; *Mackey v. People*, 2 Col. 13; by special venire, or from the by-standers: *Empson v. People*, 78 Ill. 248. In the federal practice the additional names are to be drawn from the wheel, and not by selecting additional jurors from the body of the district, or particular localities therein: *United States v. Eagan*, 30 Fed. Rep. 608; Rapalje's Criminal Procedure, sec. 65.

THE REQUISITE NUMBER AND CONCURRENCE. — The federal statute as to the impanelment and number of grand jurors (U. S. Rev. Stats., sec. 808) applies only to the circuit and district courts; the territorial courts are to be governed by the territorial laws in force at the time: *Reynolds v. United States*, 98 U. S. 145; *People v. Green*, 1 Utah, 11. At common law, a grand jury may consist of any number between twelve and twenty-three: *State v. Davis*, 2 Ired. 153; but frequent statutory departures from this rule have been made. Thus in Florida (Act of Feb. 20, 1875), and in some counties in Alabama (Sess. Acts, 1878, 1879, p. 204), fifteen was fixed as the proper number: *Keech v. State*, 15 Fla. 591; *Creamer v. State*, 70 Ala. 18; *Thompson v. State*, 70 Id. 26. As to Indiana, see *Meiers v. State*, 56 Ind. 336. In Maine, the number was originally thirteen, but was reduced to eleven: *State v. Symonds*, 36 Me. 128. In Massachusetts, the rule is not less than thirteen nor more than twenty-three: Gen. Stats., c. 171; but the summoning of a greater number is not fatal to an indictment found by the legal number: *Crimm v. Commonwealth*, 119 Mass. 326. In Texas, an indictment found by thirteen grand jurors is a nullity: *Wells v. State*, 21 Tex. App. 594; *Lott v. State*, 18 Id. 627; *McNeese v. State*, 19 Id. 48; *Smith v. State*, 19 Id. 95; *Williams v. State*, 19 Id. 265; *Ex parte Swain*, 19 Id. 323; *Rainey v. State*, 19 Id. 479. A grand jury excused one of their number from attendance; held, that as their action was a nullity, and as a quorum was present to transact business, an indictment found was not defective: *Smith v. State*, 19 Tex. App. 95; *Watts v. State*, 22 Id. 572. And in Utah, under the Poland law (18 U. S. Stats. at Large, 254, c. 469), fifteen is the proper number: *United States v. Reynolds*, 1 Utah, 226, 319; Rapalje's Criminal Procedure, sec. 66; twenty-four, however, under the general criminal practice: *Brannigan v. People*, 3 Utah, 488.

PROOF OF DUE ORGANIZATION. — The record must affirmatively show that the grand jury was duly organized; a mere indorsement on the indictment, "A true bill, J. R. D., foreman of the grand jury," will not suffice: *Palmer v. State*, 41 Ala. 416. But such an indorsement sufficiently proves the appointment of a foreman: *State v. Gouge*, 12 Lea, 132. Unless the record shows that the jurors who found the indictment were selected according to the statute, the indictment will be quashed: *State v. Conner*, 5 Blackf. 325.

It is sufficient if the record shows that the grand jury returned the indictment into open court, and the indictment itself recites that they were duly impaneled, sworn, and charged: *Powers v. State*, 87 Ind. 144. The names of the grand jurors need not appear in the record of each particular case: *Turns v. Com.*, 6 Met. 225; but they must appear in some part of the record: *Mahan v. State*, 10 Ohio, 232; see *Cross v. State*, 64 Ga. 443; and the fact that they were sworn must also appear: *Abram v. State*, 25 Miss. 589. If the record shows the return of the *venire facias*, and the selection of the jury, the *venire* need not be spread upon the minutes: *Conner v. State*, 4 Yerg. 137; 26 Am. Dec. 217; *Cornwell v. State*, Mart. & Y. 147. An imperfect return to a *venire* served, for one of the jurors who found the indictment, may be amended by the officer who served the *venire*, if he be still in office, even after a conviction for murder: *Commonwealth v. Parker*, 2 Pick. 550. If the record shows that the grand jury was complete and duly organized when sworn, an indictment subsequently found will be good, notwithstanding the record also shows irregularities in the impanelment prior to the swearing of the jury: *Ridling v. State*, 56 Ga. 601; Rapalje's Criminal Procedure, sec. 67. Thus the fact that two persons drawn and selected as grand jurors were not summoned, but voluntarily appeared, will not affect the organization of the jury: *Sylvester v. State*, 72 Ala. 201.

THE GRAND JURORS' OATH. — The statutory form of oath to grand jurors should be substantially followed: *Brown v. State*, 10 Ark. 607; and any officer authorized to administer oaths may lawfully administer it under the direction of the court: *Allen v. State*, 77 Ill. 484. The ordinary practice is to swear the foreman first, and then the others, four at a time: *Brown v. State*, *supra*. The record must show that all of them, as well as the foreman, were sworn: *Baker v. State*, 39 Ark. 180; but where one member, being detained when the others are sworn, is not present, he may be sworn afterwards: *Wadlin's Case*, 11 Mass. 142. It must appear from the indictment that it was found upon the oath of the jury: *State v. McAllister*, 13 Me. 374. In Louisiana the record need not show this; in the absence of evidence it will be presumed they were properly sworn: *State v. Watson*, 31 La. Ann. 379; but it is sufficient if it purports to be "upon their oaths," instead of "upon their oath": *Commonwealth v. Scholes*, 13 Allen, 554; *State v. Dayton*, 23 N. J. L. 49; *Jerry v. State*, 1 Blackf. 395. So, also, the grand jurors, or some of them, may affirm, but it must be shown that those so doing were entitled by law to make affirmations instead of oaths: *State v. Harris*, 7 N. J. L. 361; and that they asserted conscientious scruples against taking an oath: Rapalje's Criminal Procedure, sec. 68; *State v. Fox*, 7 N. J. L. 244. In the case of Quakers, an affirmation administered as the statute prescribes is equivalent to the oath appointed to be taken by other persons serving on the same grand jury: *Commonwealth v. Smith*, 9 Mass. 107, 110.

CHALLENGES TO THE ARRAY. — The right to challenge the grand jury, or any member thereof, for any defect or irregularity in the selection or summoning of the same, or for the disqualification or incompetency of any of its members, must in all cases be preserved to the defendant. A challenge is either to the array, for some imperfection in the impaneling of the jury; or to the polls, for some disqualification of a particular juror: *Bellair v. State*, 6 Blackf. 104; *State v. Brooks*, 9 Ala. 9; *People v. Jewett*, 3 Wend. 314; *Boles v. State*, 24 Miss. 445; *Van Hook v. State*, 12 Tex. 252. Challenges to the array are forbidden by statute in New York: 2 R. S., secs. 27, 28; Code Crim. Proc., sec. 238; *Carpenter v. People*, 64 N. Y. 483; *People v. Fitzpatrick*, 20 Hun, 493; 66 How. Pr. 14; 1 N. Y. Cr. 425; but an objection that the

persons summoned are, constitutionally, improper persons from whom to select a grand jury, is not a challenge to the array, and if made before their acceptance as grand jurors, will be considered, and if found true, the panel will be discharged, and a new one summoned: *People v. Duff*, 1 N. Y. Cr. 307. As respects challenges to the array, the federal courts follow the state practice: *United States v. Eagan*, 30 Fed. Rep. 608; but hold that where the defect is not matter of record, a plea in abatement is the proper mode of objecting to the personnel of the grand jury: *United States v. Gale*, 109 U. S. 65. The presence of an unqualified person among the jurors summoned, but who was not impaneled, affords no ground for a challenge to the array: *United States v. Rondeau*, 16 Fed. Rep. 109; nor does the death of some of those whose names are on the jury list: *Id.* A challenge to the array must be supported by affidavit setting forth the grounds of challenge: *Rapalje's Criminal Procedure*, sec. 69; *McClary v. State*, 75 Ind. 260. In New Jersey, however, objections to members of a grand jury, or to the array, cannot be raised by plea in abatement, but must be raised by challenge, before indictment, or motion to quash: *Gibbs v. State*, 45 N. J. L. 379; 46 Am. Rep. 782.

CHALLENGES FOR CAUSE, GENERALLY. — Grand jurors may be challenged for cause by any person liable to be affected by their finding: *United States v. Blodgett*, 35 Ga. 336. It is a common-law right: 2 Hawk. P. C., c. 25, sec. 16. In some cases, upon challenge for cause, bias or prejudice may be presumed; as where a grand juror has a pecuniary interest in finding an indictment, being interested in a fine or forfeiture consequent upon a conviction; or if he stands in the relation of guardian, master, employer, or principal to the prosecutor, or is a member of his family, or his partner in business, or his security on any bond or obligation: Article by Chief Justice Wade of Montana, 4 Crim. Law Mag. 180. This challenge lies also for the fact that one of the jurors is an alien: *State v. Haynes*, 54 Iowa, 109. But the burden is on the defendant to prove his alienage; or that he is otherwise unqualified to serve: *United States v. Rondeau*, 16 Fed. Rep. 109. But a grand juror will not be set aside because he was the prosecutor of one whose case may come before the jury: *Tucker's Case*, 8 Mass. 286.

CHALLENGES FOR OPINIONS FORMED OR EXPRESSED. — The fact that a grand juror has formed and expressed an opinion as to the prisoner's guilt, or shown feelings of hostility toward him, is ground for challenge: *People v. Jewett*, 3 Wend. 314. But see *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; *State v. Shelton*, 64 Iowa, 333. In *State v. Gillick*, 7 Id. 287, which may be considered a leading case upon this branch of the law of grand juries, the defendant succeeded on a motion to quash an indictment against him, on the ground that, having been held in custody on the charge at the term the grand jury that found the indictment was impaneled, no opportunity was afforded him to challenge the grand jurors. On sustaining the motion to quash, the grand jurors were brought before the court in order that the accused might challenge them. One of them, in answer to the question, "Have you formed or expressed an unqualified opinion that the prisoner is guilty of the crime with which he is charged?" said: "I have, of course, but it was in the grand-jury room, in the finding of the indictment already quashed." Defendant's challenge to this juror was overruled; and the court refused to permit him to similarly interrogate the other grand jurors, except so far as to put the following question to them: "Have you formed or expressed an unqualified opinion as to the guilt of the prisoner prior to the time when you were impaneled as a grand juror?" On appeal, the judg-

ment was reversed, the court holding that when the grand jury was brought into court for challenge, they stood in the same relation to the defendant as if they had not been impaneled and sworn, and his right of challenge was the same as if he had been permitted to exercise it in the first instance; that the overruling of the challenge to the juror first interrogated was error; and the lower court also erred in restricting the interrogatory propounded to the other jurors, it being the preconceived opinion that disqualified, not the sources from which it was formed or derived. In that state, where an indictment has been set aside for illegality, the grand jurors who found the indictment are subject to challenge on the ground that they had expressed an opinion: *State v. Osborne*, 61 Iowa, 330. Section 5 of United States act of March 22, 1882, providing that, in prosecutions for polygamy, etc., "it shall be a sufficient cause of challenge to any person drawn or summoned as a juryman or talesman" that he believes polygamy to be right, embraces persons drawn and summoned as grand jurors: *Clawson v. United States*, 114 U. S. 477.

TIME AND MODE OF CHALLENGING. — As to the proper time to challenge the array, or individual jurors, the authorities are hopelessly in conflict. Thus it is held that a challenge to the array must be interposed before the grand jury are interrogated as to their qualifications: *Reed v. State*, 1 Tex. App. 1. Compare *Green v. State*, 1 Id. 82; *United States v. Butler*, 1 Hughes, 457. Another court says that a defendant who is in court personally, or by attorney, must make the objection to the panel when his case is submitted to the grand jury: *State v. Ruthven*, 58 Iowa, 121; *State v. Osborne*, 61 Id. 330. Again, it is laid down that one who fails to challenge the grand jury, opportunity being afforded him, waives his right to object that a member thereof was not a citizen; nor does it matter that he did not learn the fact until after the indictment was found and returned: *Territory v. Harding*, 6 Mont. 323. Thus where, after the impaneling of the grand jury, upon the discovery of the destruction of an indictment found at a preceding term, defendant was brought into court, and the charge against him was submitted to the grand jury without objection, he thereby waived the right to challenge a grand juror who had been summoned as a witness against him: *Hudspeth v. State*, 50 Ark. 534. It has even been held that if the accused be in prison, an indictment will not be set aside because he was not brought before the court and given an opportunity to make his challenge: *State v. Fitzgerald*, 63 Iowa, 268; but here the court had no jurisdiction to bring him before it (see *Russell v. State*, 33 Ala. 366); the theory being that he is not entitled to notice that the grand jury is investigating a charge against him, nor to be heard before, or have witnesses examined by that body, unless it calls for the same: *People v. Goklenson*, 76 Cal. 328. In Texas, he will be brought before the court if he request it, although it is said not to be a matter of right: *Kemp v. State*, 11 Tex. App. 174. Some of the cases hold that a challenge to an individual grand juror may be made at any time before the indictment is found: *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; *Hudson v. State*, 1 Blackf. 317; *Jones v. State*, 2 Id. 475; *Mershom v. State*, 51 Ind. 14; *People v. Jewett*, 3 Wend. 314; and that it is too late after the indictment is filed and accepted by the court: *Boyington v. State*, 2 Port. 100; *Barney v. State*, 17 Smedes & M. 68. See *State v. Brown*, 10 Ark. 78; *State v. Hawkins*, 10 Id. 71. *Boyington v. State*, *supra*, is overruled on this point by the later case of *State v. Middleton*, 5 Port. 484, where it is held broadly, that any one against whom an indictment is found may object by plea to the competency of a grand juror who found the bill. In speaking of the rule laid down in *Boyington's* case

the court said: "It imposes upon every one who may by possibility be indicted the necessity of being present in court, and scrutinizing the grand jury before they are sworn. To show the unfitness of such a requisition, those who are accused of offenses and confined in jail are to be brought into court to supervise the impaneling of the grand jury, or they are to be deprived of the constitutional guaranties afforded by the eleventh and twelfth sections of the first article of our constitution. Again, the man of peaceful habits, who never expects to become obnoxious to criminal justice, yet after the grand jury are impaneled is concerned in a rencounter for which he is indicted, on coming into court and objecting to the incompetency of a grand juror, he is told that his objection, though it rests upon the basis of the constitution, cannot be entertained; that having pretermitted the occasion to aid the court with his friendly advice, it is no longer available." In Nebraska, the challenge must be interposed, if for bias or prejudice, before the jury is impaneled and sworn: *Patrick v. State*, 16 Neb. 330. To the same effect, see *Musick v. People*, 40 Ill. 268. In other cases, however, a different doctrine prevailed. Thus in *State v. Hughes*, 1 Ala. 655, one ground of a motion in arrest of judgment was, that before the grand jury were sworn, counsel asked leave of the court to ask each member whether he had formed and expressed an opinion as to the guilt or innocence of the accused, which leave was refused. In rendering the opinion of the court on appeal, Collier, C. J., said: "Without attempting to consider at length under what circumstances and for what causes challenges to grand jurors are allowable, we think the circuit court rightfully refused to permit them to be asked, before they were sworn, whether they had formed and expressed an opinion as to the guilt or innocence of the prisoner. Our grand juries are impaneled for the entire term, to inquire of all offenses committed within the body of the county, and there can be but one grand jury to the same term. Now, if objections to individual jurors were allowed before they were sworn on the panel, which went to disqualify them in particular cases, it would be difficult generally, and often impracticable, to select an unexceptionable grand jury. One man would object to one, another to a second, and so continue it until those attending on the venire were reduced below the number required by law to constitute a grand jury. But if challenges, for causes not operating a universal disqualification, should be postponed until after the jury is selected and sworn, no inconvenience will be experienced. Then a juror may be excluded in the particular case in which he is objectionable, and deliberate and act with the grand jury in the performance of the other duties devolving upon them." In the subsequent case of *State v. Clarissa*, 11 Ala. 57, the intimation above quoted, that "challenges for causes not operating a universal disqualification should be postponed until after the jury is selected and sworn," is said not to have been intended as stating the rule to be that the grand jury should be called into court by any one expecting a charge to be preferred against him, and compelled to expurgate themselves of any supposed bias, but that after indictment found the objection might be made. This explanation, however, seems to conflict with the concluding portion of the above quotation from *State v. Hughes*, *supra*, where the court speaks of excluding a juror objected to from considering "a particular case," etc., and probably means that the remedy by plea in abatement is cumulative only. See also *Thayer v. People*, 2 Doug. (Mich.) 417. In Texas, it is said such a challenge should not be made until after the jury are sworn: *Reed v. State*, 1 Tex. App. 1. In Georgia, if the delay be explained, it may be made after the grand jury is fully organized: *United States v. Blodgett*, 35 Ga. 336; the rule in that state being that points relating to the

competency of grand jurors, or to the number drawn, should be made before the true bill is found, and not on the trial before the traverse jury: *Turner v. State*, 78 Ga. 174. In Dakota, the objection is available at any time before the grand jury retire to deliberate: *People v. Wintermute*, 1 Dak. 63; S. P., *State v. Osborne*, 61 Iowa, 330.

WHEN OBJECTION IS AVAILABLE BY PLEA IN ABATEMENT. — It has been held in the federal courts that a defendant who was neither in custody nor under recognizance when the grand jury was impaneled, and so had no opportunity to challenge, may take advantage of the disqualification of any one or more of them by plea in abatement to the indictment: *United States v. Hammond*, 2 Woods, 197; *United States v. Richardson*, 8 Crim. Law Mag. 439. So also in *McQuillen v. State*, 8 Smedes & M. 587, the court say: "A prisoner who is in court, and against whom an indictment is about to be preferred, may undoubtedly challenge for cause; this is not questioned. But the grand jury may find an indictment against a person who is not in court. How is he to avail himself of a defective organization of the grand jury? If he cannot do it by plea, he cannot do it in any way, and the law works unequally by allowing one class of persons to object to the competency of the grand jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security to all, and the same principle which gives to a prisoner in court the right to challenge gives to one who is not in court the right to accomplish the same end by plea, and the current of authorities sustains such a plea." The cases, however, are in hopeless conflict on this point, and the legislatures alone have power to settle it. Thus in *United States v. White*, 5 Cranch C. C. 457, the court refused to receive a plea in abatement alleging that one of the grand jurors who found the bill had previously expressed an opinion that defendant was guilty of the offense charged, holding that while such legal disqualifications as would render a grand juror incompetent in law to act as such in any case are properly pleadable in abatement, still, objections going only to the favor in some particular case are available only by challenge interposed before the grand jurors are sworn. In *Jewett's Case*, 3 Wend. 321, which has always been deemed a leading decision upon this branch of the subject, Savage, C. J., says: "It has been urged upon us that the defendant, not having been apprised of any intended proceedings against him, and not having been arrested on a criminal charge, or required to enter into a recognizance to appear at the court when the bill of indictment was found, had not an opportunity to make his challenge; that now is his earliest day in court, and that he ought therefore to be permitted to avail himself of this defense. Although the force of this appeal is felt, I cannot yield to it, and consent that after an indictment found, the party charged may urge an objection of this kind in avoidance of the indictment. The books are silent on the subject of such exceptions after indictment found, and in the absence of authority I am inclined to say, in consideration of the inconvenience and delay which would unavoidably ensue in the administration of criminal justice, was a challenge to a grand juror permitted to be made after he has been sworn and impaneled, that the objection comes too late." Marcy, J., in giving his opinion in the same case, said: "Though I feel the force of the argument that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice if it was to be obtained in the way now proposed. No authority for adopting this course was shown in the argument, and I have not since been able to find any. It would be a novel pro-

ceeding, and there is reason to fear it might be followed with more serious difficulties than are now foreseen." This reasoning fails to convince one in search of a pure and wholesome administration of remedial justice that a fellow-being's liberty, or even his life itself, should be made to depend upon considerations of convenience or delay. The true rule is thus laid down by Mr. Wharton: "Ordinarily, after the general issue has been pleaded, objections are too late; and when the objection goes to the manner of drawing, it should be taken by challenge to the array. . . . But on principle, in those cases in which the defendant is surprised, and had no opportunity to take exceptions until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea": Wharton's Pleading and Practice, sec. 350. So, also, Mr. Bishop says that "if any one of the grand jury is personally incompetent to serve as such, as, for instance, if he is an alien, or if he is not a freeholder or householder, where the statute law of the state requires such qualification, the presence of such a disqualified person serving as a grand juror vitiates the whole finding, and the defendant may avail himself of the objection by plea in abatement. . . . So, likewise, may he, according to the doctrine prevailing in some and perhaps in most of the states, thus avail himself of an irregularity in the summoning or impaneling of the grand jury, or show that the grand jurors have not been selected according to the directions of the statute": 1 Bishop's Crim. Proc., sec. 749. In a very recent case decided in the United States district court for the northern district of California, it is held that facts contrary to the record, or which can be proven only by the testimony of grand jurors disclosing their proceedings, or impeaching their findings, cannot properly be inquired into by plea in abatement, but the inquiry must be addressed to the discretion of the court, by suggestion or motion, and it will be allowed only in rare and extraordinary cases, where the matters, if true, work a manifest and substantial injury to the defendant: *United States v. Terry*, 39 Fed. Rep. 816.

Upon a careful review of the authorities, it would seem that the more sound as well as humane rule is, that the objection that the grand jury has not been drawn, summoned, and impaneled according to law may be made by plea in abatement at the court at which the indictment is found: *State v. Greenwood*, 5 Port. 474; *State v. Leaben*, 4 Dev. 305; *State v. Freeman*, 6 Blackf. 248; *Barney v. State*, 12 Smedes & M. 68; but not in the appellate court: *Bass v. State*, 37 Ala. 469; *Floyd v. State*, 30 Id. 511. In Ohio, however, only individual incompetency can be pleaded in abatement: *Huling v. State*, 17 Ohio St. 583. And it is well settled in most jurisdictions that the objection, whether it be to the array or to individual jurors, and whether it be interposed by challenge or by plea in abatement, must be made before pleading in bar to the indictment, or the right to object will be waived: *United States v. Gale*, 109 U. S. 65; 5 Crim. Law Mag. 57; *Wright v. State*, 42 Ark. 94; *Horton v. State*, 47 Ala. 58; *State v. Watson*, 31 La. Ann. 379; *McElvoy v. State*, 9 Neb. 157; *People v. McCann*, 3 Park. Cr. 272; 2 Lawson's Defenses, 490, and cases there cited; *People v. Allen*, 43 N. Y. 28. The rule that an objection to the qualifications of a grand juror comes too late after the jury has been impaneled and sworn, is also sustained by the following cases: *Commonwealth v. Smith*, 9 Mass. 107, 110; *Commonwealth v. Gee*, 6 Cush. 174; *People v. Jewett*, 3 Wend. 314, 321; at least if the accused has previously been held to answer: *People v. Beatty*, 14 Cal. 566. Other cases hold that the objection may be taken by plea in abatement: *State v. Rockafellow*, 6 N. J. L. 332; *Commonwealth v. Cherry*, 2 Va. Cas. 20; *Stanley v. State*, 16 Tex. 557; *State v. Middleton*, 5 Port. 484; *Barney v. State*, 12 Smedes & M. 68; *State v.*

Duncan, 6 Yerg. 271; *Doyle v. State*, 17 Ohio, 222; *Huling v. State*, 17 Ohio St. 583; *Kitrol v. State*, 9 Fla. 9.

POWERS AND DUTIES OF GRAND JURORS. — Perhaps the most lucid explanation of the scope and extent of the inquisitorial powers of the grand jury is contained in a charge given to the grand jury of the United States circuit court, in the district of California, by Justice Field of the supreme court of the United States, in 1872. Among other things, he said: "We therefore instruct you that your investigations are to be limited, — 1. To such matters as may be called to your attention by the court; or 2. May be submitted to your consideration by the district attorney; or 3. May come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or 4. May come to your knowledge from the disclosures of your associates. You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally, such parties are actuated by private enmity, and seek merely the gratification of their own personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury. When the court does not deem the matter of sufficient importance to call your attention to it, and the district attorney does not think it expedient to submit the matter to your consideration, and the private prosecutor neglects to proceed before the committing magistrate, we think it may be safely inferred that public justice will not suffer if the matter is not considered by you. A preliminary examination of the accused before a magistrate, where he can meet his prosecutor face to face, and cross-examine him and the witnesses produced by him, and have the benefit of counsel, is the usual mode of initiating proceedings in criminal cases, and is the one which presents to the citizen the greatest security against false accusations from any quarter. And this mode ought not to be departed from, except in those cases where the attention of the jury is directed to the consideration of particular offenses by the court, or by the district attorney, or the matter is brought to their knowledge in the course of their investigations, or from their own observations, or from disclosures made by some of their number. We have been led, gentlemen, to give these instructions upon the nature of your duties and the limits to the sphere of your investigations, because an impression widely prevails that the institution has outlived its usefulness, — an impression which has been created from a disregard of those limits, and the facility with which it has, unfortunately, often been used as an instrument for the gratification of private malice": 2 Saw. 673.

In some jurisdictions the grand inquest has power, and it is its duty, to inquire into all offenses committed in the county, whether the offenders have been arrested or not: *Ward v. State*, 2 Mo. 120; 22 Am. Dec. 449; *People v. Hyler*, 2 Park. Cr. 566; *State v. Jackson*, 32 Me. 40. In Pennsylvania, however, it is held that while the grand jury can act upon offenses of public notoriety, and such as are within their own knowledge, such as are given to them in charge by the court, and such as are sent up to them by the district attorney, they cannot indict in any other cases, without a previous prosecution before a magistrate: *McCullough v. Commonwealth*, 67 Pa. St. 30; *Rapalje's Criminal Procedure*, sec. 71. In Iowa, the authority of the grand jury to make inquiries

and find indictments does not depend on the submission by the court to them of charges against supposed offenders; and Iowa Code, section 4290, providing that a charge once dismissed shall not again be submitted to the grand jury without the direction of the court, does not prevent the grand jury, on its own motion, from investigating the charge and finding a valid indictment thereon *State v. Collis*, 73 Iowa, 542. In all ordinary cases, however, the prosecution should come to them through the ordinary channel of a warrant and commitment: *Commonwealth v. Jadwin*, 1 Crim. Law Mag. 231 (Pa.). In the case last cited, which was a motion to quash an indictment for libel in the court of quarter sessions of Lackawanna County, Pennsylvania, the charge was first made and a hearing had before a committing magistrate, resulting in the discharge of the accused. The district attorney received the indictment, prepared with others, from his predecessor in office, and at the request of the prosecutor sent the indictment, with the witnesses, before the grand jury, in ignorance that there had been no binding over by a magistrate. The indictment bore the signature of the outgoing district attorney, which the present one erased, substituting his own in its place. The court did not direct the indictment to be sent to the grand jury, neither did the district attorney ask leave, nor did he send it specially as in a case in which, for reasons of public policy, he is authorized by law, in Pennsylvania, to initiate proceedings of his own motion. In deciding the motion to quash, the court, per Hand, J., said: "That a grand jury may, of their own motion, present a person charged with a crime or misdemeanor, is beyond question; that a district attorney may, by information, initiate proceedings, is also true; and that in some cases, after a trial and conviction, it will be presumed that all things were regularly done, and with the sanction of the court, is also held by our courts; but all these proceedings are regulated by our laws so as to give a rule in each case, and so as to protect the rights of the citizen. The law in all ordinary cases protects these rights by a preliminary hearing in which the accused may meet his accuser face to face. The accused is presumed innocent until proven guilty. This preliminary hearing acquaints him with the charge, and the particularities of time, place, and circumstances connected with the charge. . . . Without this the defendant knows nothing of what he is to meet. Evidence may be sprung upon him which could be explained and wholly remove the offense under the law. . . . In the present case it is urged that there was a hearing before the committing magistrate, and although defendant was discharged it gave him notice of what he is to meet. The presumption arising from the facts we apprehend is exactly the opposite. Having once been discharged, the defendant has reason to suppose that now he has something different to meet. It is not alone the charge he is to meet, but the evidence." But the prosecuting officer may send in an indictment to the grand jury without a previous binding over or commitment of the accused: *Commonwealth v. English*, 11 Phila. 439; and in England it would seem that, with certain exceptions, any one can send up a bill before the grand jury, accusing any person of any crime whatever, and the first intimation such person receives of the charge may be his arrest to take his trial: See article by John Kinghorn, in 3 Crim. Law Mag. 297, 328. The investigation by the grand jury must be in accordance with the well-established rules of evidence, and they must hear the best legal proof of which the case admits: *United States v. Kilpatrick*, 16 Fed. Rep. 765. The proof, to justify an indictment, must be such that, if unexplained, it would sustain a conviction: *People v. Hyler*, 2 Park. Cr. 570; and no evidence should be presented to them which would not be legal and competent at the trial before the petit

jury: *People v. Moore*, 65 How. Pr. 177. On this point, Justice Field, in 2 Sawyer, above referred to, says: "Formerly, it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty; or in other words, you ought not to find an indictment, unless in your judgment the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury." Probable cause to believe the accused guilty is not enough, and was not even before Lord Coke's time; for in speaking of the reign of Edward I., he said: "In those days, as yet it ought to be, indictments taken in the absence of the party were formed on plain and direct proof, and not upon probabilities and inferences": 2 Inst. 384. So, also, one of the most eminent of English judges and writers on the law — Judge Wilson — says of this doctrine of probable cause in the grand-jury room: "It is a doctrine which may be applied to countenance and promote the vilest and most oppressive purposes; it may be used in pernicious rotation as a snare in which the innocent may be entrapped, and as a screen under which the guilty may escape": 2 Wilson's Works, 365. The same doctrine is laid down by Blackstone: 4 Com. 303; and recognized in the trial of Lord Shaftesbury: 4 How. St. Tr. 183; see also 1 Archbold's Crim. Proc., Waterman's Notes, 325, note 1.

This rule, however, does not apply on a preliminary examination before a committing magistrate; there no more than probable cause to consider the prisoner guilty is required to be shown to warrant a commitment: 1 Burr's Trial, 11, 15. But even there, probable cause must arise on the whole case, and the accused has an opportunity to adduce evidence on his own behalf, which right does not follow his case into the grand-jury room: Wharton's Crim. Pl. & Pr., sec. 72; though the grand jury may, and they should, cause to be produced before them any testimony which is accessible, and which they have reason to believe might explain the charge, and enable them to arrive at a satisfactory conclusion. "You will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more, if, in the course of your inquiries, you have reason to believe that there is other evidence not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced": Judge Field's charge, 2 Saw., *supra*. It must not, however, be understood from this that the grand jury may hear any witnesses for the defendant, as such; but they may call before them any person whom they have reason to believe may aid them in arriving at a satisfactory conclusion; in other words, they should examine the whole transaction out of which the accusation arises, and not indict for an isolated fragment of it: 4 Crim. Law Mag. 187. But the court cannot inquire into the character of the evidence upon which an indictment was found: *Smith v. State*, 61 Miss. 754. When a bill is submitted with the names of witnesses indorsed thereon, the grand jury may summon such witnesses: *Lewis v. Comm'rs of Wake*, 74 N. C. 194; and they may send for witnesses in many cases without any order of court: *State v. Barnes*, 5 Lea, 398. "If they are not to be trusted with the power to send for witnesses," say the court in *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, "till some malignant prosecutor or some injured person shall cause an indictment to be sent up to them, this would strip them of their greatest utility, — would convert them into a mere engine to be acted upon by circuit attorneys, or those who

might choose to use them." In Georgia, while the powers of a grand jury are inquisitorial to a certain extent, they must be exercised only within the well-defined limitations. Anything the jurors can find out by their own inquiry and observation is legitimate and praiseworthy; but they have no authority to force private persons or officers of other courts to disclose to them violators of the public laws, and the names of persons by whom such infractions can be established: *In re Lester*, 77 Ga. 143. In Tennessee, this inquisitorial power, being unknown to the common law, exists, with respect to any given offense, only when expressly conferred by statute: *State v. Lee*, 87 Tenn. 114; and the grand jury have no power in that state to send for and examine witnesses regarding the offense of engaging in a riot, since that offense is not named in any of the statutes conferring such power upon the grand jury: *State v. Lewis*, 87 Id. 119. So, also, in North Carolina, a prosecuting officer has no right to send witnesses to the grand-jury room merely to be interrogated whether there have been any violations of law within their knowledge: *Lewis v. Commissioners*, 74 N. C. 194. The witnesses should be so sworn that perjury may be predicated on false testimony: *State v. Fasset*, 16 Conn. 457; and either the foreman of the grand jury or the clerk of the court may swear them: *State v. White*, 88 N. C. 698; see also *State v. Allen*, 83 Id. 680. The accused has no right to submit evidence in his own behalf, even with the consent of the district attorney: *United States v. Blodgett*, 35 Ga. 336; or to be present at the examination of the witnesses: *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; see also Hale P. C. 157; 2 Hawk. P. C., c. 25, sec. 145, note; Addison's Appendix, 38; *Luno's Case*, 1 Conn. 428; *Respublica v. Shaffer*, 1 Dall. 255; *United States v. Palmer*, 2 Cranch C. C. 11. Still, Mr. Justice Washington seems to recognize the right to send witnesses for the defense to the grand jury with the consent of the district attorney, but not without it: *United States v. White*, 2 Wash. C. C. 29, 30. And Mr. Justice Field's charge to the grand jury would seem to lay down the same rule: 2 Saw. 670. In California, New York, and several other states, such course is expressly permitted by statute.

SECRECY OF THE GRAND-JURY ROOM. — The general opinion is, that the prosecuting officer may, and that it is his duty as well as his privilege to, attend upon the grand jury with matters upon which they are to pass, to aid in the examination of witnesses, and to give such general instructions as they may require; but he should make no attempt to influence their action, or to give effect to the evidence adduced. He should withdraw after the evidence is presented; but in the absence of any proof of his participation in the deliberations of the grand jury, his mere presence in the jury-room during their deliberations is not sufficient ground for quashing the indictment: *Commonwealth v. Bradney*, 126 Pa. St. 199. In North Carolina, however, a more stringent rule prevails. Thus in *Lewis v. Commissioners*, 74 N. C. 194, the court hold that a solicitor cannot instruct the grand jury in the law, and that he has no business in the grand-jury room. In the course of the opinion, Bynum, J., says: "None but witnesses have any business before them. No one can counsel them but the court. They do not communicate with the solicitor, but with the court, either directly or through an officer sworn for that purpose. They act upon their own knowledge or observation in making presentments. They act upon bills sent from the court with the witnesses. The examination of witnesses is conducted by them without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or suggestions of others, or the opportunity thereof." Compare *United States v. Schumann*, 7 Saw. 439. In the federal courts, the pres-

ence of the district attorney during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is, at most, an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form, and not of substance: *United States v. Terry*, 39 Fed. Rep. 355; citing *United States v. Tuska*, 14 Blatchf. 5; *United States v. Ambrose*, 3 Fed. Rep. 283. In England, it seems not to be unusual for the public prosecutor to remain with the grand jury while they are deliberating upon or deciding any question of finding a bill: 1 Chitty's Crim. Law, 317. Generally speaking, the presence of a mere stranger in the grand-jury room will vitiate an indictment found during his presence there; but the objection is too late on a motion for a new-trial: *State v. Justus*, 11 Or. 178; 50 Am. Rep. 470; *Johnson v. State*, 22 Tex. App. 206. Not so, however, unless he participated in the proceedings: *State v. Clough*, 49 Me. 573.

GRAND JURORS AS WITNESSES — DISCLOSURE OF PROCEEDINGS BY OTHERS. — At common law, a member of the grand jury could not testify as to what transpired in the jury-room, for reasons of public policy: 12 Vin. Abr. 20, Ev. H; Clayt. 84, pl. 140; 4 Bla. Com. 126. These reasons are well stated in *Commonwealth v. Mead*, 12 Gray, 167, where the court say: "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold: One is, that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is, that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is, to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it before the presentment is made. . . . But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione cessat regula*. After the indictment is found and presented, and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged, and its prosecution, are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence essential to his defense, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist." Mr. Christian, in his notes to Blackstone, refers to a Yorkshire trial, where a grand juror, hearing a witness swear upon the trial of a prisoner contrary to the evidence he had given before the grand jury, communicated the fact to the judge, who committed the witness for perjury, to be tried upon the testimony of the grand juror, on the ground that public justice required that what the witness had testified to before the grand jury should be disclosed. Mr. Christian says: "It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of persons against whom bills were found. This is a privilege which may be waived by the crown": 4 Bla. Com. 126, note. In *State v. Broughton*, 7 Ired. 96, 45 Am. Dec. 507, the court say: "The principal ground of policy is, no doubt, to inspire the jurors with a confidence of security in the discharge of

their responsible duties, so that they may deliberate and decide without an apprehension of any detriment from an accused or any other person, but be free 'true presentment to make.' Therefore it is clear that at no time nor upon any occasion ought a grand juror to make known who concurred in or opposed the presentment, as the power to do so would or might in some degree impair that perfect freedom from external bias, which a grand juror ought to feel. It is probable likewise that another ground is, that it might lead to the escape of criminals, if their friends or others on the grand jury were at liberty to make known the institution and progress of an inquisition into their guilt. But as that reason can operate only while the accused is at large, it would seem that as far as the rule depends on that, it would not be obligatory after his arrest. We think, too, that in furtherance of justice the law may have intended to forbid a grand juror from giving aid to one indicted, and thus found to be probably guilty, in his efforts to defeat the prosecution by publishing the evidence before the grand jury, and thus enabling him to counteract it, perhaps by foul means, after he knew where the case pinched. That would be betraying 'the state's counsel,' which is necessarily opened to the grand jury." So, also, a witness could not disclose the evidence he gave in the grand-jury room: *State v. Knight*, 43 Me. 1; and even where the witness was disposed to conceal facts known to him, it was held that he could not be asked whether he did not swear to those facts before the grand jury: *Commonwealth v. Welsh*, 4 Gray, 535. In *Rex v. Watson*, 32 How. St. Tr. 107, however, where a witness was questioned as to statements made by him before the grand jury, Lord Ellenborough said he had considerable doubt as to the propriety of the question, but he remembered a case in which a similar question was permitted, and therefore he would allow it. He did not mention the title of the case, however. But this rule has been changed in many of the states by statute, so that a grand juror may be compelled, in furtherance of justice, to testify as to what a witness swore to before the grand jury, in order to see whether his testimony there was consistent with the evidence he gives before the court: *State v. Wood*, 53 N. H. 484; or whether a certain person did or did not testify before the grand jury: *Commonwealth v. Hill*, 11 Cush. 137; or who was the prosecutor in a given case: *Sykes v. Dunbar*, 2 Selw. N. P. 815; *Huidekoper v. Colton*, 3 Watta, 56. In *Ex parte Schmidt*, 71 Cal. 212, which was a motion to quash on the ground that the names of all the witnesses examined before the jury had not been indorsed upon the indictment, a grand juror was committed for contempt in refusing to testify as to what persons were examined before the grand jury. In *Commonwealth v. Hill*, 11 Cush. 137, which was an indictment for receiving stolen goods, a witness for the commonwealth swore that he had given certain testimony before the grand jury that found the indictment, whereupon the defense called the foreman, who testified that the witness was not before the grand jury at all at the term at which the indictment was found. As to the competency of this evidence, the court, per Bigelow, J., say: "The extent of the limitations upon the testimony of grand jurors is best defined by the terms of their oath of office, by which 'the commonwealth's counsel, their fellows, and their own, they are to keep secret.' They cannot, therefore, be permitted to state how any member of the jury voted, or the opinion expressed by their fellows or themselves upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any person not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded. . . . To this extent the free, impartial, unbiased administration of justice requires that the proceedings

before grand juries be kept secret." . . . But we are not aware that the sanction of secrecy has ever been extended beyond this. We know of no authority which carries the rule of exclusion further, and we can see no ground of policy or sound reason for its extension."

Thus it is now quite well settled that a grand juror may be called to show that a witness who has just testified on the trial swore differently before the grand jury: *State v. Benner*, 64 Me. 267; *Canton v. State*, 13 Tex. App. 139; overruling *Ruby v. State*, 9 Id. 353; *Gordon v. Commonwealth*, 92 Pa. St. 216; 37 Am. Rep. 672; 1 Crim. Law Mag. 583; *Shattuck v. State*, 11 Ind. 473; *Way v. Butterworth*, 106 Mass. 75; *Commonwealth v. Mead*, 12 Gray, 167; 71 Am. Dec. 741; either for the purpose of impeaching the witness or to punish him for perjury, though cases are found holding a contrary doctrine: *Imlay v. Rogers*, 7 N. J. L. 347; *Tindle v. Nichols*, 20 Mo. 326; *Beam v. Sink*, 27 Id. 261; *People v. Young*, 31 Cal. 563; *State v. Broughton*, 7 Ired. 96; 45 Am. Dec. 507. See also *Stats v. Wood*, 53 N. H. 484; *Little v. Commonwealth*, 25 Gratt. 921; *United States v. Charles*, 2 Cranch C. C. 76; *Burnham v. Hatfield*, 5 Blackf. 21; *Perkins v. State*, 4 Ind. 222. And a witness who testified before the grand jury can be called for the same purpose: *Regina v. Hughes*, 1 Car. & K. 519; *Regina v. Gibson*, 1 Car. & M. 672; *United States v. Farrington*, 2 Crim. Law Mag. 525. Indeed, whenever it becomes necessary to the protection of public or private rights, any person may disclose in evidence what transpired before a grand jury: *United States v. Farrington*, 2 Crim. Law Mag. 525. This case also holds, however, that it cannot be shown how individual jurors voted, or what they said during their investigations. See also, generally, as to the secrecy of the grand-jury room, *Sands v. Robinson*, 12 Smedes & M. 704; *Beam v. Link*, 27 Mo. 261; *Jones v. Turpin*, 6 Heisk. 181; *Commonwealth v. Mead*, 12 Gray, 167; 71 Am. Dec. 741. In *Imlay v. Rogers*, 7 N. J. L. 347, a motion for a new trial was made on the ground that the judge who presided at the trial had refused to permit a member of the grand jury to testify that one who had been examined as a witness on the trial had sworn differently on his examination before the grand jury in relation to the same transaction. A new trial was refused, the court being equally divided, but no opinion is reported. In Missouri, the statute provides that members of the grand jury may be required by any court to testify whether what a witness has sworn to before them is consistent with or different from his evidence before such court, and "to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense." In *Tindle v. Nichols*, 20 Mo. 326, which was an action for slandering plaintiff's wife, in saying that she, as a witness before the grand jury, had given false testimony, the defendant introduced several of the grand jurors to prove the truth of his statement; the trial judge ruled them to testify, against plaintiff's objections and their own. On appeal, the court held the statute to embody the law of the state upon the subject, and only to require the grand juror to testify as to whether the testimony of a witness on the trial of an indictment is consistent with that given before the grand jury by which the bill was found. Ryland, J., in delivering the opinion of the court, says: "Permit any party, in any court, in any controversy, to call a grand juror as a witness, and examine him as to what he heard a witness swear before his body, and you destroy at once one of the great, inherent, essential qualities of the grand juror. If you can examine a grand juror as a witness in an action of slander, so you may in any action; break down this guard in one instance, and what will hinder it from being done in any and all others? These provisions of

our statute concerning secrecy of grand jurors have their origin in the common law. Any person who may be present on the occasion is bound not to disclose what may transpire, and the jurors themselves are, by the terms of their oath, laid under the same obligation; and if they transgress it, they are finable." A contrary doctrine, however, prevails in Massachusetts. Thus in *Way v. Butterworth*, *supra*, which was a civil suit on a promissory note, it was held that what a notary testified to before the grand jury as to presentment and non-payment of the note in suit was a proper subject of inquiry. In *State v. Broughton*, before-quoted from, it is said: "It is obvious that if grand jurors are, through all time and to all purposes, prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming; for, besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests. It would be extraordinary were witnesses thus enabled to perjure themselves without responsibility."

But no evidence before the grand jury can be used for the purpose of invalidating the indictment: *State v. Fassett*, 16 Conn. 457; or to show that a pretended indictment had not been found: *State v. Oxford*, 30 Tex. 428. So on a motion to set aside an indictment, the character of the evidence on which the grand jury acted cannot be inquired into: *State v. Fowler*, 52 Iowa, 103. The seal of secrecy is not altogether removed; thus it cannot be shown how the individual jurors voted: *United States v. Farrington*, 2 Crim. Law Mag. 525; *Ex parte Sontag*, 64 Cal. 525; *United States v. Kilpatrick*, 5 Crim. Law Mag. 692. "But when, for the purposes of public justice, or for the protection of private rights, it becomes necessary, in a court of justice, to disclose the proceedings of the grand jury, the better authorities now hold that this may be done. It is obvious that there are certain transactions of the grand-jury room which it can never be for the interests of justice to disclose; for example, what particular jurors concurred in or opposed the finding of the indictment, or what opinions were expressed by various members of the body. In respect to such matters, the injunction of secrecy may well be perpetual": Thompson and Merriam on Juries, sec. 703. The limit to which the cases have gone in this direction is to allow the question, "Did twelve grand jurors concur in finding the indictment?" Thus in *Low's Case*, 4 Me. 439, while that question was admitted, the court carefully excluded any inference that it would be proper to ask how any individual juror voted. "The oath of the grand juror," said Weston, J., "requires him to keep secret the state's counsel, his fellows', and his own. Of this character may be what particular jurors agreed or dissented upon the questions whether a true bill or not. . . . But the fact whether twelve or more concurred or not in the bill is not a secret. It is a result which they are required, through their organ, the foreman, to make known." And Preble, J., added: "How any juror voted is a secret no juror is permitted to disclose; but whether twelve of their number concurred in finding a bill is not a secret of the state, their fellows', or their own. It is a fact they, of necessity, profess to disclose every time they promulgate their decision upon any bill laid before them." Some courts, however, refuse to permit grand jurors to testify whether they voted at all, how they or their companions voted, or whether

twelve concurred in the finding: Thompson and Merriam on Juries, sec. 704, and cases cited in the note.

CIVIL LIABILITIES OF GRAND JURORS. — A grand juror is a judicial officer within the rule exempting such officers from civil liability for their judicial acts, even though done maliciously, and however erroneous such acts may be. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty: *Turpen v. Booth*, 56 Cal. 65. Mr. Proffat says on this subject: "The secret inquisitorial proceedings of the grand jury may, as they often have, work very oppressively and unjustly; for only so far as guarded and restrained by an oath, their action is generally irresponsible and conclusive in finding an indictment. During the whole of their proceedings they are protected in the discharge of their duty, and no action or prosecution can be maintained, no matter how they may be actuated by malice or indiscretion": Proffat on Jury Trial, sec. 55; see also *Weaver v. Devendorf*, 3 Denio, 120, 121, and cases there cited; also *Bradley v. Fisher*, 13 Wall. 335; *Downer v. Lent*, 6 Cal. 94; *Scott v. Stanfield*, L. R. 3 Ex. 220.

DISCHARGE OF THE GRAND JURY. — A grand jury does not cease to be such before the adjournment of the term, unless the statute explicitly so declares: *State v. Winebrenner*, 67 Iowa, 230; and even such adjournment does not operate the discharge of the grand jury; they may find indictments at the adjourned term, unless discharged meanwhile: *State v. Pate*, 67 Mo. 488. The discharge of two or three grand jurors, in order to allow them to attend to their private business, will not vitiate an indictment found by the others: *Denning v. State*, 22 Ark. 131; the court may substitute other persons in place of the discharged jurors: *State v. Fowler*, 52 Iowa, 103; 2 Crim. Law Mag. 45; or reassemble the whole jury after its discharge: *Newman v. State*, 43 Tex. 525. But a grand jury cannot be discharged as to some of the persons indicted by it, and remain as to the others; if discharged as to one, it must be discharged as to all; nor can the order of discharge have a retroactive operation so as to nullify an indictment already found: *People v. Fitzpatrick*, 1 N. Y. Cr. 425; Rapalje's Criminal Procedure, sec. 73.

BUZBY v. PHILADELPHIA TRACTION COMPANY.

[126 PENNSYLVANIA STATE, 559.]

NEGLIGENCE. — DUE AND ORDINARY CARE MUST BE EXERCISED IN CROSSING PUBLIC STREETS, as in all the other transactions of life. Even on the sidewalk, specially devoted to the use of foot-passengers, a person is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where he is bound to take notice of such other rights, and to use his own with due regard thereto.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE AS GROUND OF NONSUIT. — The plaintiff was a passenger upon a cable-car, and got out on the north side of the car, and was in a place of entire safety between the tracks, where he could see the whole of them. Instead of looking westward, from which direction alone danger was to be apprehended, and without waiting for the car to move on, he turned sharply around the rear of the car,

and started to cross the street, stepping upon the south track, and was struck and injured by another car going east. In such case the plaintiff was properly nonsuited upon the ground of contributory negligence.

ACTION in case, brought by Buzby against the Philadelphia Traction Company, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's employees. The facts appear in the opinion. The plaintiff was nonsuited, and assigned as error the order entering judgment of nonsuit, and the refusal of the court to vacate said judgment.

Samuel G. Thompson and Andrew MacBride, for the plaintiff in error.

David W. Sellers and Gavin W. Hart, for the defendant in error.

MITCHELL, J. The plaintiff had been carried to his destination, had alighted from the car in a place of safety, and his relation to the defendant as a passenger had ceased. The case therefore is the ordinary one of a traveler about to cross a public street, on which are two sets of railroad tracks, besides the usual space for wagons, etc., between the sidewalks.

Counsel for plaintiff in error seem to lay much stress on the argument that the case is not within the imperative rule for railroad crossings, that the traveler must stop, look, and listen. But no such test was applied in the court below to the plaintiff's conduct. On the contrary, it was expressly disclaimed, though the counsel for defendant called attention to the fact that the cars in question were so-called cable-cars, whose controlling motive power was steam.

But the case was tried below, and must be tested here upon the universal rule which requires due and ordinary care in crossing public streets, as in all the other transactions of life. Even on the sidewalk, specially devoted to the use of foot-passengers, a man is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other rights, and to use his own with due regard thereto. The language of Chief Justice Gordon, in *Schmidt v. McGill*, 120 Pa. St. 412, 6 Am. St. Rep. 713, is precisely applicable to the present case: "Here was a place where both parties must be on the lookout; the one for pass-

ing teams, and the other for foot-passengers. Both have the right of way, and both must be equally cautious."

The facts in the present case were undisputed. By his own evidence it appeared that plaintiff got out on the north side of the car, and was in a place of entire safety. If he had looked to the right he could have seen the south track, from which alone danger was to be apprehended, for a square or more to the west, except for a moderate space nearest to him, where the car out of which he had just got would obstruct his vision. If he had waited a moment for the car to move on again, he would have had an unobstructed view of this space. He neither looked nor waited, but, turning sharply around the rear of the car, started to cross the street. There was still a chance, however, for prudence and care. The space between the two sets of tracks was four and a half feet, and the overhang of the cars rather less than a foot on each side, still leaving room enough to stand in complete safety, where a turn of his head would have shown him the whole track he was about to step on. Instead of looking, he bolted ahead right into the car, which was upon him at the instant he set foot on the track.

This was a plain disregard of the dictates of the most ordinary prudence, and there was no room for a jury to be allowed to draw any other inference. The accident was unfortunate, but it was clearly the result of his own negligence, and the nonsuit was properly ordered.

Judgment affirmed.

NEGLIGENCE — IT IS DUTY OF PEDESTRIAN UPON PUBLIC HIGHWAY to use reasonable care for his own safety, and to avoid an open or apparent danger: *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note 536, 537; *Stringer v. Frost*, 116 Ind. 474; 9 Am. St. Rep. 875, and note 878.

PEDESTRIAN IN CITY IS NOT NECESSARILY NEGLIGENT in walking on a sidewalk which he knows to be unsafe, in a dark night, as the nearest way to his destination, instead of taking another way which is also unsafe: *City of Altoona v. Lots*, 114 Pa. St. 238; 60 Am. Rep. 346; and see *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111; 44 Am. Rep. 274; *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230.

CONTRIBUTORY NEGLIGENCE IN CROSSING STREET SUFFICIENT TO DEFEAT RECOVERY. — The plaintiff, desiring to cross a street in a city, saw a car approaching, and behind it a cart going faster than the car. He "calculated" that he could cross in front of the car "before the cart could get up," and made the attempt, and passed in front of the car, but was struck by the cart, and injured. In an action against the owners of the cart, it was held that the plaintiff was guilty of contributory negligence, defeating a recovery: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 570.

CONTRIBUTORY NEGLIGENCE. — Plaintiff was not guilty of contributory negligence *per se* in going along a street for a lawful purpose without looking

behind him, when it appears that the street was not much thronged with vehicles. *Undheim v. Hastings*, 38 Minn. 485. Ordinary care is an essential element of an injured party's right to recover, and unless he has observed this duty to himself, no recovery can be had: *Willard v. Swansen*, 126 Ill. 381. A recovery cannot be had for an injury which resulted from the joint concurring negligence of plaintiff and defendant: *Chicago etc. R'y Co. v. Hedge*, 118 Ind. 5; *Harold v. Jones*, 86 Ala. 274; *Morrison v. Board of Commissioners*, 116 Ind. 431. But plaintiff may recover for an injury to which his own negligence remotely contributed, if the absence of such negligence on his part would not have avoided the injury: *Kennedy v. County Commissioners*, 69 Md. 65. In an action for an injury sustained by a traveler by a collision with a railroad train at a public crossing, the burden of proof is on plaintiff to show the absence of contributory negligence on his part: *Guggenheim v. Lake Shore etc. R'y Co.*, 66 Mich. 151; *Deikman v. Morgan's L. etc. R. R. & S. S. Co.*, 40 La. Ann. 787. But in a South Carolina case, it has been held that a plaintiff is not required to show the absence of contributory negligence on his part, but that such negligence must be set up as a defense by defendant: *Joyner v. South Carolina R'y Co.*, 26 S. O. 49. And where plaintiff fails to make out a case of negligence against defendant, the question of contributory negligence will not arise: *Simms v. South Carolina R'y Co.*, 26 Id. 490. Contributory negligence, to be good as a defense, must have been proximate, and have essentially contributed to the injury sustained: *Montgomery G. L. Co. v. Montgomery etc. R'y Co.*, 86 Ala. 372. That no other road existed by which plaintiff could reach his destination, is competent in ascertaining whether he was guilty of contributory negligence in attempting to travel a road which he knew was partially obstructed: *Skjeggerud v. Minneapolis etc. R'y Co.*, 38 Minn. 56.

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1. **IT IS WELL SETTLED THAT A PRINCIPAL IS RESPONSIBLE** for the misrepresentations of his agent, within his authority; and the better opinion is, that, as to third parties affected by the agent's acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. *Griswold v. Gebbie*, 878.
2. **BROKER, WHEN ENTITLED TO COMMISSION ON SALE OF REAL ESTATE.** — Sale is effected, so as to entitle a real estate broker to his commission, within the meaning of a contract by which the vendor agreed to pay him a commission if he should "effect a sale" of certain real estate, where such contract was made after the terms of a sale between the

vendor and vendee, brought together by him, were settled, and subsequently the parties signed an agreement to sell and buy within a certain time, on condition that a certain release should be procured, and afterwards, solely because of the failure of the vendee to pay as agreed, the vendor notified him that "the matter was at an end," and retained the money already paid by the vendee as a forfeit. *Ward v. Cobb*, 587.

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See NEGOTIABLE INSTRUMENTS, 2.

APPEAL AND ERROR.

1. **ERROR WITHOUT PREJUDICE IS NOT GROUND FOR REVERSAL** of a judgment. *Hansen v. Pence*, 717.
2. **ERROR IN DENYING MOTION TO DISMISS ON GROUND OF FAILURE OF PROOF IS CURED**, if the necessary proof is afterwards supplied, even though by the defendant; and for the purpose of determining whether a verdict for the plaintiff is sustained by the evidence, the court will consider the whole evidence in the case, whenever and by whomsoever introduced. *Id.*
3. **MISCONDUCT OF COUNSEL IN ARGUMENT IS NOT GROUND FOR REVERSAL**, where, upon objection thereto being made, the trial court does all in its power to relieve the party complaining from any injury likely to result from such misconduct. *Kern v. Bridwell*, 409.
4. **ALTHOUGH THERE WERE ERRORS IN CHARGE TO JURY, NEW TRIAL WILL NOT BE GRANTED** where it appears from the evidence that the injury complained of was the result of an unavoidable occurrence which could not have been prevented by the exercise of even extraordinary diligence. *Prather v. Richmond etc. R. R. Co.*, 263.
5. **JUSTICES OF THE PEACE — NEW TRIAL.** — **IRRELEVANT CHARGE BY JUSTICE OF PEACE IS NOT OBLIGATORY UPON JURY**, and when the plaintiff in error has procured the charge to be given as pronounced obligatory, the appellate court will not reverse a judgment granting a new trial, although the verdict was amply justified by the evidence. The prevailing party must take the consequences of a new trial which is justified by an illegal charge prompted by his own counsel. *Travelers' Ins. Co. v. Jones*, 270.

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 7. **PLEADING AND PRACTICE — OBJECTION.** — Where the record does not disclose the ground of objection to the admissibility of evidence, the question will not be passed upon by the appellate court. *Tarver v. Torrance*, 311.
 8. **NEW TRIAL — EVIDENCE, ADMISSIBILITY OF.** — Where the brief used on a motion for a new trial sets out in specific terms the substance of a certain deed, the rejection of which, as evidence, constitutes a ground of the motion, this is a sufficient description of the deed to authorize the appellate court to pass upon the question of its admissibility in evidence, although the deed was not set out in full. *Shore v. Miller*, 239.
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RECOVERY FOR VOLUNTARY SERVICES, PERFORMANCE OF WHICH IS INDUCED BY FRAUD. — Where a person, under a mistake of fact, is induced by the fraud and concealment of another to perform for him valuable services, the law raises an obligation to pay what the services are reasonably worth, and *assumpsit* lies to recover the same, although when rendered there was no expectation that they should be paid for. *Boardman v. Ward*, 749.

ATTACHMENT AND GARNISHMENT.

1. A WRIT OF ATTACHMENT CAN HAVE NO FORCE UNLESS ISSUED IN AN ACTION ON A CONTRACT EXPRESS OR IMPLIED. *Mudge v. Steinhart*, 17.
2. WRIT OF ATTACHMENT IS NOT A LAWFUL PROCESS OF THE COURT, and therefore cannot be invoked to sustain the jurisdiction of the court, when it appears from the final judgment that the plaintiff had no cause of action against the defendant upon any contract express or implied. *Id.*
3. WHEN ATTACHMENT WILL NOT SUPPORT JUDGMENT. — If the defendant is a non-resident of the state, and has not entered his appearance in the action, a judgment for the sale of his attached property cannot be maintained where the recovery against him is only upon a cause of action for which no attachment could lawfully issue. *Id.*
4. COLLATERAL ATTACK ON AN ATTACHMENT CAN NEVER BE SUSTAINED FOR CAUSES which do not render the writ absolutely void, and not merely voidable. *Id.*
5. AFFIDAVIT FOR ATTACHMENT NEED NOT STATE WHETHER AFFIANT'S AVERTMENTS ARE BASED UPON DIRECT KNOWLEDGE, or upon information and belief. If the facts are stated positively without qualification, it will be implied that they were within the knowledge of affiant. *Simpson v. McCarty*, 37.
6. ONE MAKING AFFIDAVIT FOR AN ATTACHMENT IN BEHALF OF A CREDITOR NEED NOT SHOW THAT HE IS AN AGENT of the creditor for the collection of the debt, or by express averment, that he makes it in plaintiff's behalf, nor that the facts are peculiarly within his knowledge, nor that there is any particular reason or excuse for the omission of the plaintiff to make the affidavit himself. *Id.*
7. AN AFFIDAVIT FOR AN ATTACHMENT STATING THAT THE DEFENDANT IS INDEBTED TO THE PLAINTIFF in a specific sum of money, over and above all legal set-offs and counterclaims, "upon an account stated, a contract for the direct payment of money," etc., is sufficient. It sufficiently appears from such affidavit that the defendant is indebted to the plaintiff upon a contract express or implied. *Id.*
8. THE DEFENDANT IN AN ACTION FOR A TORT is not subject to garnishment till final judgment is recovered. A garnishment issued and served after a first verdict for the plaintiff in the action, which verdict is subsequently set aside, and a new trial granted, and answered before a second trial is had, the answer denying any indebtedness, seizes nothing, and takes no lien on the final recovery. *Gamble v. Central R. R. & B. Co.*, 276.

ATTORNEY AND CLIENT.

1. AN ATTORNEY MAY CONTRACT WITH HIS CLIENT FOR A SPECIAL FEE in a special case, where the client is a corporation which the attorney is serving at a salary which may be changed at the option of the corporation, and when the period of the attorney's employment is subject to the same condition. *Bartlett v. Odd Fellows Sav. Bank*, 139.
2. AN ATTORNEY ACQUIRES NO LIEN ON A CAUSE OF ACTION BY COMMENCING SUIT THEREON. His lien does not exist until after judgment is obtained. *Randall v. Van Wagenen*, 828.
3. AN ATTORNEY DISCHARGED WITHOUT CAUSE WHILE ACTING UNDER CONTRACT, UNDER WHICH HE WAS TO HAVE A SPECIFIC AMOUNT FOR SERVICES which he had agreed to render, may recover the amount to which he would have been entitled had his client allowed him to complete the

services which he had commenced to perform. The client, by wrongfully preventing the performance of the acts which entitled the attorney to the special compensation, becomes answerable in damages in such amount, with interest from the time it became due. *Bartlett v. Odd Fellows Sav. Bank*, 139.

1. PARTIES, WITHOUT CONSENT OF THE ATTORNEY, MAY SETTLE AND DISCONTINUE A SUIT BEFORE JUDGMENT, because, prior to judgment, the attorney has no lien, and the only remedy is against his client for compensation. If, however, a settlement is made collusively, for the purpose of defrauding the attorney out of his costs, the court may interpose for his protection by permitting him to proceed with the suit, and to recover, if the facts permit it, to the extent of his costs in the action. *Randall v. Van Wagenen*, 828.
5. AN ATTORNEY CANNOT, ON THE COMPROMISE OF A SUIT WITHOUT HIS CONSENT, maintain an independent action against the defendant in such suit on a claim that by a fraudulent and collusive settlement such defendant has prevented the attorney from prosecuting the former action to judgment, and thereby obtaining the fruits of an agreement between the attorney and the plaintiff, by the terms of which the attorney was entitled to one half of any sum recovered, and to repay himself out of the other one half for advances made by him to the plaintiff. *Id.*
6. SUSPENSION OF AN ATTORNEY UNTIL THE PAYMENT OF A CERTAIN JUDGMENT AGAINST HIM. — An attorney at law may be suspended for a definite time and until a designated judgment against him shall be fully satisfied, under a statute authorizing the court to deprive him of the right to practice, either permanently or for a limited period. *In re Tyler*, 55.
7. SERVICE OF NOTICE OF APPEAL UPON AN ATTORNEY AFTER THE DEATH OF HIS CLIENT cannot bind the representatives of the latter, because the authority of the attorney terminates with the life of his client. *Moyle v. Landers*, 22.

See APPEAL AND ERROR, 3, 5; CHAMPERTY, 1; DAMAGES, 4; ESTOPPEL, 4; LIMITATION OF ACTIONS, 2.

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See DESCENT AND DISTRIBUTION, 5.

BANKS AND BANKING.

1. A BANK HAS AN EQUITABLE LIEN ON SHARES OF ITS STOCK for all sums of money due from the person in whose name such stock stands, when the certificate for such stock declares, "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name stock stands on the books of the bank, except by the written assent of the president or cashier"; though there was no by-law of the corporation nor any resolution of its board of directors authorizing the insertion of this condition in this certificate. A stockholder who accepts a certificate with this condition printed on it, and then borrows money of the bank, must be held to have assented to the condition, and to be bound by it. *Jennings v. Bank of California*, 145.
2. CONDITION PRINTED IN AND UPON A CERTIFICATE OF STOCK is sufficient to put a purchaser thereof on inquiry, and make it his duty to ascertain whether the stock is free of such condition. *Id.*

3. **ASSIGNEE OF STOCK IN A BANK WHO GIVES NO NOTICE OF THE TRANSFER** TO HIM holds title subordinate to any lien the bank may have for money advanced to his assignor in ignorance of the transfer. *Id.*
4. **ASSIGNEE OF STOCK IN A BANK, THE TRANSFER TO WHOM HAS NOT BEEN ENTERED UPON ITS BOOKS**, has a mere equity which must yield to any superior equity or lien of the bank. *Id.*
5. **DUTY OF DIRECTORS AS TO CASHIER.** — A bank director who serves without compensation is neither required to be an expert or a competent book-keeper, nor to do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity, that his daily, weekly, or monthly statements correspond with the general balance upon the books of the bank. If this is done, and an adequate bond required of such cashier for the faithful discharge of his duties, the director is not personally liable for his defalcation. *Savings Bank v. Caperton*, 488.
6. **DUTY OF DIRECTORS—BURDEN OF PROOF.** — In an action against the directors of a bank to make them personally liable for the misappropriation of funds by the cashier, the burden of proof is on the plaintiff to show a want of diligence on the part of the directors in discovering or preventing the defalcation. *Id.*
7. **LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER.** — Where directors of a bank place certain bonds belonging to their bank in another bank to enable the former to draw upon the latter, and the cashier of the former bank pledges the bonds as collateral to raise money which he converts to his own use, the directors are not guilty of neglect, nor liable personally, for the defalcation of the cashier, in the absence of reason to suspect his fidelity and honesty to the bank. *Id.*
8. **LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER.** — Where the cashier of a bank in his statement as to its condition uses the bonds of one of the directors as assets in his absence, this does not indicate negligence or want of diligence in the bank directors in not examining the bank-books to ascertain to whom the bonds were charged, especially when the bank is accustomed to invest in like bonds, and the directors had no reason to suspect the integrity of the cashier. *Id.*
9. **LIABILITY OF DIRECTORS FOR DEFALCATION OF THEIR CASHIER.** — The directors of a bank who receive no compensation for their services are not personally liable for the defalcations of their fellow-director whom they have chosen as cashier, teller, and book-keeper of the bank, with no reason to suspect his fidelity to its interests, and whose past life as a business man, so far as known, was a guaranty of his honesty and capacity, and whose experience in banking, personal and financial character for integrity, commended him to all business men as well qualified for the position. *Id.*
10. **LIABILITY OF DIRECTORS FOR DEFALCATIONS OF THEIR CASHIER.** — The directors of a bank who serve without compensation are not liable personally for the defalcation of the person chosen as cashier, teller, and book-keeper, in the absence of any reason for suspecting his honesty, or any gross neglect on their part, and when they have exercised such reasonable diligence and ordinary care with reference to the affairs of the bank as ordinarily prudent men would exercise in reference to such business affairs. *Id.*
11. **NOTICE TO MANAGING OFFICER OF BANK ACTIVELY ENGAGED IN ITS DAILY BUSINESS**, given during banking hours at its place of business, is notice to the bank. *Second Nat. Bank v. Howe*, 744.

12. **BANK IS NOT BOUND BY ACTS OR STATEMENTS OF ONE WHO IS DIRECTOR ONLY,** but has no part in its management nor voice in the direction of its affairs. *Id.*
13. **LIABILITY OF BANK FOR FRAUDULENT REPRESENTATIONS OF ITS MANAGING OFFICER.** — Where the maker of an accommodation note duly notifies a bank that he rescinds the engagement evidenced by the note, and the managing officer of the bank thereupon makes false and fraudulent statements respecting the solvency and financial standing of the payee, which are of a character calculated to, and which actually do, mislead the maker and induce him to withdraw his previous rescission of the contract, and consent to the negotiation of the note, the bank will be responsible for the consequences, if it subsequently receives the note from the payee. And it is not material that, at the time such statements were made, the bank was not interested in or connected with the note. *Id.*
14. **COLLECTION OF CHECKS — AGENCY.** — A national bank which becomes the agent of another bank to collect checks and drafts, under a contract by which the agent might mingle the proceeds collected with his own money, making itself the principal debtor for the amount received, but by which no debt was created until the checks or drafts were paid, has no right to collect a check and take the proceeds as his own upon its becoming insolvent; and where a check was indorsed by it "for collection" of the principal, and was sent by it to a subagent bank, which collected the check after the agent had suspended, the subagent is liable to the principal for the proceeds thereof. *Manufacturers' Nat. Bank v. Continental Bank*, 598.
15. **SAVINGS BANK — UNDERTAKING TO DEPOSITORS — APPORTIONMENT OF LOSSES AMONG DEPOSITORS.** — Savings bank, incorporated under the laws of Massachusetts, undertakes to its depositors to combine and manage their deposits according to the best judgment of the trustees, and to share among them in just proportion the beneficial results, if any, of such management; but there is no absolute promise to repay to any depositor the full amount of his deposit at all events, and in case of loss, the loss must be borne *pro rata* by the depositors. *Lewis v. Lynn Institution for Savings*, 535.
16. **SAVINGS BANK — LOSSES SHARED EQUALLY AMONG DEPOSITORS UNDER BY-LAWS.** — Losses of a savings bank in Massachusetts are, by intentment of law, to be shared equally, where it appears by its by-laws that the depositors are to stand on a basis of equality, though profits only are spoken of in terms. *Id.*
17. **SAVINGS BANK — SETTLEMENT OF ACCOUNT WITH DEPOSITOR IN CASE OF LOSS — PRESUMPTION FROM LAPSE OF TIME.** — Depositor of savings bank in Massachusetts, who, with knowledge of the facts and without objection, accepts the balance remaining after a proportionate deduction is made by the trustees to meet a loss which has occurred preventing the payment of deposits in full, is bound by such settlement, and cannot afterwards recover the amount of such deduction; and after a lapse of fifty years from the time the deduction is made, the deposit withdrawn, and the account closed on the books of the bank, it will be assumed that the apportionment of the loss was just, that notice thereof was given the depositors, and that it was known to the complaining depositor when the money was paid. *Id.*

BAWDY-HOUSE.

See CRIMINAL LAW, 6, 7.

BILLS OF LADING.

See CARRIERS, 3.

BONA FIDE PURCHASERS.

See MARRIED WOMEN, 3, 4; SPECIFIC PERFORMANCE, 4.

BONDS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; OFFICE AND OFFICERS, 1, 2.

BOUNDARIES.

See MINES AND MINING, 1, 2; MUNICIPAL CORPORATIONS, 20.

CARRIERS.

1. CARRIER IS NOT THE AGENT OF THE VENDER to accept goods, unless specially authorized. *Pierson v. Crooks*, 831.
2. COMMON CARRIER IS NOT LIABLE TO OWNER OF GOODS FOR THEIR CONVERSION by transporting them in good faith from their place of deposit under the direction of a person in apparent control of them, and capable of immediately taking them into his actual custody, and delivering them to such person at another place. *Gurley v. Armstead*, 555.
3. BILLS OF LADING — EXTENT OF CARRIER'S LIEN. — Goods were shipped under a bill of lading containing a clause as follows: "Said merchandise may be retained for all arrearages of freight and charges due thereon, and also on any other goods by the same consignee or owner; and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid." In such case, the consignor having exercised his right of stoppage *in transitu*, and not being a debtor for previous carriage, the carrier's lien did not extend beyond the charges applicable to the goods stopped, and on payment or tender of such charges the consignor was entitled to a delivery of the goods to him. *Pennsylvania R. R. Co. v. American Oil Works*, 885.
4. BAGGAGE CHECK IS IN NATURE OF RECEIPT, and is evidence of the delivery, ownership, and identity of the baggage. *Ahlbeck v. St. Paul etc. Ry Co.*, 661.
5. POSSESSION OF BAGGAGE CHECK BY RAILWAY PASSENGER IS PRIMA FACIE EVIDENCE of the receipt and possession of his baggage by the carrier, and when he delivers such check to the agent of a connecting railroad company, and receives its check in exchange, a presumption arises, in the absence of proof to the contrary, that the baggage is received in due course by the latter company, and it is responsible therefor. *Id.*
6. LIABILITY FOR LOSS OF PASSENGER'S BAGGAGE. — Where the trains of a railroad company, by arrangement with another company, enter and depart from the depot of the latter, to which the former intrusts the business of receiving, handling, and checking the baggage of its passengers, and furnishes its own checks for the purpose, such company must be considered the agent of the company first named, in respect to such business. *Id.*
7. CARRIER OF PASSENGERS IS BOUND TO EXERCISE UTMOST CARE AND DILIGENCE in providing against those injuries which human care and foresight can guard against; by which is to be understood the utmost care

- consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. *Dodge v. Boston etc. S. S. Co.*, 541.
8. **CARRIER OF PASSENGERS OWES PASSENGER NO DUTY TO PROVIDE FOR HIS SAFETY WHEN ACTING IN DISOBEDIENCE OF REASONABLE ORDERS AND REGULATIONS;** and therefore, where a carrier by steamer provided a safe and convenient means of egress for passengers from the saloon deck, and a passenger was injured while attempting to land from a gang-plank on the main deck, which was intended to be used exclusively by employees, and there was evidence that he was notified that passengers were to land from the saloon deck only, and was subsequently warned by the mate not to leave from the main deck, a refusal to instruct the jury that he could not recover if he received such notice and warning, unless the injury was willfully inflicted, should have been given. *Id.*
 9. **CARRIER OF PASSENGERS IS BOUND TO EXERCISE SAME DEGREE OF CARE TOWARDS PASSENGER IN HIS EGRESS** from the vehicle of transportation for a proper purpose as when he remains thereon; and therefore, where a passenger by steamer was injured in attempting to leave the boat, an instruction that the carrier "did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer," is properly refused. *Id.*
 10. **SICK PASSENGER, OBLIGATION OF RAILROAD COMPANY TO ASSISTANTS CARRYING INTO TRAIN.** — Where a passenger is sick, and in so enfeebled a condition as to require assistants to carry him from the station to a seat in the train upon which he has secured a passage, the railroad company, having contracted to carry him with knowledge of his condition, is under obligation to stop the train long enough to allow the assistants a reasonable time to leave the train as it would have been had they been passengers on the train, although they voluntarily offered their services. *Louisville etc. R. R. Co. v. Crunk*, 443.
 11. **PASSENGER'S RIGHT TO A SEAT.** — A passenger on a railway train may rightfully refuse to pay fare unless provided with a seat, and he does not become a trespasser on the train by so refusing; and the company is bound to afford him a reasonable opportunity to leave the train. *Hardenbergh v. St. Paul etc. R'y Co.*, 610.
 12. **WITH OR WITHOUT A TICKET, A PASSENGER HAS NO RIGHT TO REMAIN ON A TRAIN** and be carried when he is disorderly, or uses any obscene, profane, or vulgar language. *Peavy v. Georgia Railroad and Banking Co.*, 334.
 13. **EJECTION OF PASSENGER.** — A railroad company having the right to eject from its train one not a trespasser must do so at a regular station. But a trespasser may be ejected at a place other than a station, provided he is not wantonly exposed to peril of serious personal injury. *Hardenbergh v. St. Paul etc. R'y Co.*, 610.
 14. **PASSENGER'S RIGHTS IN LEAVING AND RETURNING TO VEHICLE OF TRANSPORTATION AT INTERMEDIATE POINTS.** — Passenger is entitled to protection, as such, as well when leaving and returning to the vehicle of transportation at intermediate points of a journey, for a purpose naturally and ordinarily incidental to his passage, as at any other time; and therefore a passenger by steamer can properly go on shore at an intermediate point of his journey to get his breakfast, and has a passenger's right to protection during his egress from the boat for that purpose, where the steamer stopped at a wharf where there was a restaurant kept

by the owner of the wharf at which passengers bound beyond, whose tickets did not entitle them to meals on the steamer, were accustomed to get breakfast, with the knowledge and without objection of the carrier. *Dodge v. Boston etc. S. S. Co.*, 541.

15. NEGLIGENCE. — Action may be maintained jointly against two railroad companies for the killing of a passenger in a train of one of the defendants, in a collision with a train of the other, where the collision and injury were caused directly by the concurrent negligence of both defendants, and a complaint in such action alleging negligence in the operation of both trains is sufficient. The negligence of the carrier upon whose train the deceased was a passenger is not imputable to him. *Flaherty v. Minneapolis etc. R'y Co.*, 654.

See COMMERCE, 1, 2; CONSTITUTIONAL LAW; SALES, 4, 8, 12.

CHAMPERTY.

1. AGREEMENT IS NOT CHAMPERTOUS by which an attorney was to receive a certain per cent of the amount recovered for his services and expenses in the prosecution of a claim for the destruction of property by a confederate cruiser before the court of commissioners of Alabama claims, the proceeding before such tribunal being an inquest, and not a trial or a lawsuit. *Manning v. Sprague*, 508.
2. CONVEYANCE OF LAND HELD ADVERSELY. — Where two or more joint tenants convey their interest in land to a stranger, who conveys the whole tract to another stranger, who goes into possession, after which another of the joint tenants, who was not a party to the first conveyance, conveys his interest in the land to a third party, the stranger in possession holds adversely to the tenant last conveying, so that his vendee gets no title; and the conveyance is void, as champertous, under section 2, chapter 11, General Statutes of Kentucky, prohibiting the sale of land, adversely held, to a stranger to the title. *Adkins v. Whalin*, 470.

CHATTEL MORTGAGES.

See ACKNOWLEDGMENTS.

COMMERCE.

1. TRANSPORTATION BY COMMON CARRIER IS "COMMERCE" WITHIN MEANING OF FEDERAL CONSTITUTION. — The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as used in the provision of the constitution of the United States empowering Congress to regulate commerce with foreign nations and among the several states. *State ex rel. v. Chicago etc. R'y Co.*, 730.
2. RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA HAS NO AUTHORITY TO PRESCRIBE RATES for transportation by common carriers in another state, and cannot fix rates for transportation between two points within Minnesota over a route extending across a neighboring state. The power to do this is vested exclusively in Congress. *Id.*

CONDITIONS.

See DEEDS, 3-6.

CONFLICT OF LAWS.

See USURY.

CONSIDERATION.

See DEEDS, 9, 10.

CONSTITUTIONAL LAW.

DELEGATION OF LEGISLATIVE POWER. — Where a statute delegates power to a railroad commission to fix just and reasonable rates for freight and passenger tariff, to be observed by railroad companies, such statute is not unconstitutional as being a delegation of legislative power and control. *McWhorter v. Pensacola etc. R. R. Co.*, 220.

See COMMERCE; CRIMINAL LAW, 3; FENCIBLES, 2; MUNICIPAL CORPORATIONS, 16-18; STATUTES.

CONTEMPT.

See MARRIAGE AND DIVORCE, 2.

CONTINUANCE.

See APPEAL AND ERROR, 2.

CONTRACTS.

1. **CONTRACT IS NOT ENTIRE AND INDIVISIBLE BECAUSE EMBRACED IN ONE INSTRUMENT**, if it provides for the sale and purchase of different kinds of articles, and the prices are different and specific for each kind. Hence, where one class of articles were shipped to the vendee, which he accepted, this will not preclude him from rejecting a later shipment of another class on the ground that it did not comply with the contract of purchase. *Pierson v. Crooks*, 831.
2. **CONTRACT WHEREIN PRINCIPAL AGREED TO FURNISH SUFFICIENT SAMPLES TO AGENT, CONSTRUCTION OF.** — A written contract entered into between principal and agent, whereby the latter was to sell a certain article, contained a provision by which the principal agreed to furnish the agent with sufficient samples of the article, and printed matter in the nature of advertisements relating thereto, as the same might be called for by the agent. Under this provision, the employer was not bound to submit to an unreasonable and unconscionable demand by his agent for samples, and what was a reasonable quantity, if the parties failed to agree about it, was a question of fact for the jury, and not to be determined by the agent alone. *Jensen v. Perry*, 888.
3. **CONTRACT TO FURNISH FIRST-CLASS MACHINERY** of a certain kind means such as corresponds with the best of that kind in general use, and not merely the best kind of a particular manufacture, unless the two superlatives coincide. *Van Winkle v. Wilkins*, 299.
4. **DAMAGES — BREACH OF CONTRACT — TIME — EVIDENCE.** — In an action for damages for breach of contract to furnish machinery by a certain time, parol evidence is admissible to show whether time was of the essence of the contract, and whether the damages claimed were in the contemplation of the parties at the time that the contract was executed. *Id.*
5. **CONTRACT BETWEEN TWO LIEN CREDITORS WHEREBY ONE OF THEM IS DEBARRED FROM BIDDING** at an orphans' court sale of real property, the

arrangement being entered into unknown to the heirs of the decedent, is against public policy, and void, although the property was not worth the liens against it. *Barton v. Benson*, 883.

3. **LENDER'S KNOWLEDGE OF USE TO BE MADE OF MONEY DOES NOT INVALIDATE MORTGAGE WHEN.** — Although a corporation executes a mortgage to secure the payment of money borrowed by it to be used in a transaction in which it has no power to engage, yet if the contract between it and the lender is not in violation of law, or declared void by statute, the money lent may be recovered by the lender, though he knew the purpose for which the money was obtained, unless he was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act. *Wright v. Hughes*, 412.

See ATTACHMENT, 1, 2, 7; CHAMPERTY, 1; CORPORATIONS, 7, 8; DAMAGES, 2, 9, 10; ESTOPPEL, 3; FRAUD, 4-7; HUSBAND AND WIFE, 3; INSURANCE, 2; SALES, 13.

CONVERSION.

See CARRIERS, 2; OFFICE AND OFFICERS, 4.

CORPORATIONS.

1. **POWER OF CORPORATION TO BORROW MONEY.** — Where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories, and may borrow money to attain its legitimate objects, precisely as an individual, and may bind itself by any form of obligation not forbidden. *Wright v. Hughes*, 412.
2. **ULTRA VIRES, DEFENSE OF, NOT ALLOWED, WHEN.** — Where an insurance company having power to borrow money, and to secure its payment by mortgaging its real estate, does so, and uses the money borrowed by it, and afterwards becomes insolvent, neither the corporation nor its policyholders will be heard to contend that the mortgage is void, and that the loan was *ultra vires*, on the ground that the corporation had no power to engage in the transaction in which the money borrowed was used. The doctrine of *ultra vires* only concerns the corporation in its relations with the state and with its stockholders, and is never entertained where it will injure innocent third persons. It is unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. *Id.*
3. **AUTHORITY OF SECRETARY OF A CORPORATION TO MAKE AN ASSIGNMENT** of indebtedness due to it will not be presumed; it must be proved. *Beard v. Buffum*, 131.
4. **NOTICE OF THE WANT OF AUTHORITY OF AN OFFICER OF A CORPORATION TO EXECUTE A NOTE** must be imputed to the assignee of such note when such officer is also the payee therein. *Smith v. Los Angeles etc. Ass'n*, 53.
5. **A MAJORITY OF A QUORUM OF A BOARD OF DIRECTORS OF A CORPORATION** is essential to the adoption of a resolution; and it is equally essential that such majority be not made up of directors who are disqualified to act by reason of their interest in the resolution. *Id.*
6. **A DIRECTOR IN A CORPORATION IS DISQUALIFIED TO VOTE UPON A RESOLUTION** authorizing the renewal of two notes, one of which is in his favor; and his vote cannot be treated as sufficient to sustain that note in which he had no interest. *Id.*

7. **SUBSCRIPTION BY NUMBER OF PERSONS TO STOCK OF CORPORATION** to be thereafter formed by them is, — 1. A contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation, and as such is binding and irrevocable from the date of the subscription, unless canceled by consent of all the subscribers before acceptance by the corporation; and 2. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation. *Minneapolis T. Mach. Co. v. Davis*, 701.
8. **PROMOTER OF PROPOSED CORPORATION SOLICITING AND OBTAINING SUBSCRIPTIONS IS AGENT** for the subscribers as a body to hold the subscriptions until the corporation is formed in accordance with the terms and conditions of the agreement, and then turn them over to it without any further act of delivery on the part of the subscribers; and therefore the delivery of a subscription to him is a complete delivery so as to make it *eo instanti* a binding contract. *Id.*
9. **EVIDENCE OF CONDITION ATTACHED TO DELIVERY OF SUBSCRIPTION INADMISSIBLE, WHEN.** — Where a subscriber to the stock of a proposed corporation delivers the subscription to the promoter of such corporation, and other persons without knowing that there was any oral condition attached to such delivery also subscribe to the stock and pay in a large part of their subscriptions, and the corporation is organized and engages in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of such secret oral condition, such subscriber, when sued upon his subscription, will not be permitted to show, in defense to the action, that he attached a secret oral condition to the delivery of his subscription. In such case the principle applies that where a person by his words or conduct willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other. *Id.*
10. **STOCK AND STOCKHOLDERS — CALL FOR UNPAID ASSESSMENTS — STATUTE OF LIMITATIONS.** — Where, under an act of incorporation, a call for unpaid stock subscriptions is to be made upon stockholders whenever necessary, and no call is ever made, but the corporation assigns for the benefit of creditors without giving the assignee power to make such call, after which the court decrees that the assignee be removed, the corporation debts ascertained, a new trustee appointed to carry out the purposes of the assignment, and a call made for unpaid stock subscriptions, the statute of limitations does not begin to run against the trustee until such call is made. *Glenn v. Howard*, 318.
11. **STOCK AND STOCKHOLDERS — EQUITY — LACHES.** — While a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, or others who participate therein, the minority stockholders, when they have been injured or damaged by such acts, must act promptly, and not wait an unreasonable time. If they postpone their complaint for an unreasonable time, as from seven to fifteen years, they forfeit their right to equitable relief. *Alexander v. Searcy*, 337.

- 12. STOCK AND STOCKHOLDERS—ACQUIESCENCE—LACHES.** — Though purchasing, owning, and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public is concerned, still a stockholder who has acquiesced therein for fifteen years, and received money from the corporation by reason of the illegal act, is not allowed to raise that question. His acquiescence does not render valid the illegal act, but prevents him from taking advantage of its illegality. The public or the state is not thus bound. *Id.*
- 13. STOCK AND STOCKHOLDERS.** — Holders of a majority of the stock in a corporation have a right to control it, and the minority cannot interfere therewith unless they show some good reason for interference. They must establish by their complaint that they have exhausted all the means within their power to obtain redress for their grievances or action in conformity with their wishes, and that their effort to obtain redress at the hands of the other directors and stockholders has been earnest and faithful. *Id.*
- 14. STOCK AND STOCKHOLDERS.** — A person who did not own stock at the time of fraudulent transactions complained of, or whose shares have not devolved upon him since by operation of law, cannot maintain a suit to have such transactions declared illegal. *Id.*
- 15. ORDINARILY, REDRESS FOR WRONG TO CORPORATE RIGHTS OR PROPERTY MUST BE SOUGHT** in the name of the corporation, and a stockholder cannot sue for the damage to him individually, unless the corporate authorities refuse to act when applied to by him. But when the wrong-doers are the managers and majority of the stockholders, who have diverted the corporation and its assets and business from their legitimate purposes to the private use and benefit of one of such majority, a minority stockholder may sue for redress without application to have suit brought in the name of the corporation. *Rothwell v. Robinson*, 606.
- See ATTORNEY AND CLIENT, 1; BANKS AND BANKING; CONTRACTS, 6; ESTOPPEL, 3; LIBEL AND SLANDER, 9, 10.

CO-TENANCY.

- 1. TENANT IN COMMON WHO PAYS OFF LIEN AGAINST JOINT PROPERTY IS ENTITLED TO CONTRIBUTION** from his co-tenants to the extent of their respective interests; and a court of equity, to secure such contribution, will enforce upon the interests of the co-tenants an equitable lien of the same character as that which has been removed. *Moon v. Jennings*, 383.
- 2. TENANT IN COMMON IS NOT ENTITLED TO HAVE HIS TITLE QUIETED** as against his co-tenant who holds a certificate of purchase issued by the sheriff on a sale of the joint property under a foreclosure of a mechanic's lien thereon, and who is entitled to contribution from said tenant in common in proportion to his interest in the land. *Id.*
- 3. COMPLAINT IN ACTION BY TENANT IN COMMON TO BE RELIEVED FROM JUDGMENT BY DEFAULT** quieting his co-tenant's title is sufficient, where it shows that the plaintiff was misled as to the character of the action by the way in which the complaint in that action was drawn, and by the representations of defendant's counsel as to the nature of the relief sought, and by the violation of an agreement to dismiss the action upon compliance with a certain condition, and also shows, as a defense

to the action, that the plaintiff has paid liens against the joint property for which he is entitled to contribution. *Id.*

See CHAMPERTY, 2; PARTNERSHIP, 1.

COUNTIES.

1. **LIABILITY OF FOR OBSTRUCTING A WATERCOURSE.** — A county is not liable for flooding the premises of a citizen, caused by the obstruction of the course of a stream by county officers, in the proper discharge of their duties in the course of the county's employment. *Downing v. Mason County*, 473.

2. **LIABILITY OF FOR TORT.** — Counties are not liable to a private action at the suit of a party injured by a neglect of the county's officers to perform a corporate duty, unless such right of action is given by statute. *Id.*

See DEDICATION, 2, 3.

COVENANTS.

See DEEDS; ESTOPPEL, 5.

CRIMINAL LAW.

1. **RECAPTION OF ONE'S PERSONAL PROPERTY BY FORCE.** — One whose personal property has been wrongfully taken from him by another may thereupon retake possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon, and is not liable criminally for so doing. *Commonwealth v. Donahue*, 591.

2. **POWER TO IMPRISON UNTIL A FINE IS PAID.** — Where a sentence upon conviction of larceny is to pay a fine, and is accompanied with an order of commitment until payment is made, the fine is the penalty, and the commitment is the method of enforcing its payment or of enforcing the sentence. *Ex parte Bryant*, 200.

3. **CONSTITUTIONALITY OF SENTENCE OF FINE OR IMPRISONMENT UNTIL PAYMENT THEREOF.** — A sentence to pay a fine, accompanied with an order of commitment until payment thereof, is not unconstitutional as inflicting "indefinite imprisonment," as such sentence with award of process does not necessarily create an indefinite or any imprisonment. *Id.*

4. **PRESENTMENT, PROPERLY SPEAKING,** is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. *Commonwealth v. Green*, 894.

5. **GRAND JURY MAY ACT UPON AND MAKE PRESENTMENT OF ONLY SUCH OFFENSES** as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney; but in no other cases, without a previous examination of the accused before a magistrate. *Id.*

6. **QUASHING INDICTMENT.** — **BILL OF INDICTMENT FOR KEEPING COMMON BAWDY-HOUSE**, sent before the grand jury by the district attorney, by leave of court, and based upon a presentment made by the grand jury, not upon their knowledge and observation, but upon the testimony of certain witnesses examined before them upon a charge of assault and battery against another defendant, will be quashed on motion. *Commonwealth v. Green*, 894.

7. **QUASHING INDICTMENT — EVIDENCE. — ON HEARING OF MOTION TO QUASH INDICTMENT FOR KEEPING BAWDY-HOUSE**, upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, but upon the testimony of witnesses taken before them on another complaint, a member of the grand jury is a competent witness to testify that that body, in making the presentment, acted upon such testimony, and not upon their own knowledge and observation. In such case, if the testimony of the grand juror is objected to, and the objection is overruled and an exception sealed, the question of admissibility of the testimony is properly brought upon the record, under Pennsylvania act of May 19, 1874, P. L. 219. *Id.*
8. **LARCENY. —** Where one wrongfully and fraudulently represents himself as the agent of another, and thereby gains possession of goods which the party delivers to him with the sole intent that they shall be delivered by him to his alleged principal, and he converts the goods to his own use, he is guilty of larceny. *Harris v. State*, 355.
9. **LIQUOR LAWS — PRINCIPAL AND AGENT. —** Where one is guilty of a violation of the liquor laws in selling alcohol to a minor, he cannot excuse the crime on the ground that the intoxicant was sold by his clerk, and not by himself. *Snider v. State*, 350.
10. **LIQUOR LAWS — LICENSE — SELLING INTOXICANT TO MINORS. —** Though no license is required of druggists for the sale of alcohol, still as it is a spirituous or intoxicating liquor, no druggist or other person has a right to sell or furnish it to a minor without the written consent of his parent or guardian. *Id.*
11. **WHETHER SHAVING OF CUSTOMER BY BARBER ON SUNDAY IS WORK OF NECESSITY**, within the meaning of the exception in the statute prohibiting the desecration of the sabbath, is a question of fact to be determined by the jury, under proper instructions from the court. *Ungericht v. State*, 419.

DAMAGES.

1. **VERDICT OF FIVE THOUSAND FIVE HUNDRED AND FIFTY DOLLARS FOR PERSONAL INJURIES IS NOT EXCESSIVE**, where the evidence shows the injuries to be serious and permanent. *Hannen v. Pence*, 717.
2. **DAMAGES ARISING FROM BREACH OF CONTRACT** contemplated by the parties at the time the contract was made is not too remote to be recovered, but may be the subject-matter of recoupment. *Van Winkle v. Wilkins*, 299.
3. **INTEREST AT THE LEGAL RATE CANNOT BE ADDED BY THE JURY, IN THEIR DISCRETION**, to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased. *Western and Atlantic R. R. Co. v. Young*, 320.
4. **IN ORDER TO RENDER THE ADVICE OF COUNSEL ADMISSIBLE EVIDENCE** in mitigation of damages, it must appear that the advice was given upon a full and fair statement of the facts, or of such of them as were material to the question on which counsel was consulted. *Shores v. Brooks*, 332.
5. **WRONGFUL DETENTION OF GOODS FROM OWNER — MATTER IN MITIGATION OF DAMAGE. —** If goods are wrongfully withheld from the owner, in order to subject them to levy under process to be issued, the wrongdoer is not entitled to show, in mitigation of damages, that the goods were subsequently applied in satisfaction of an execution issued upon a judgment against the owner. But if the goods, though wrongfully

withheld, are subject to levy, and are in good faith and without fraud or collusion afterwards levied on and sold under process against the owner, that fact may be shown in mitigation. *Beyersdorf v. Sump*, 687.

6. FOR A PERSONAL INJURY TO A CHILD NINE YEARS OF AGE, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Amongst the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority. *Western etc. R. R. Co. v. Young*, 320.
7. MEASURE OF DAMAGES — NEGLIGENCE. — Where plaintiff, in a personal action for injury resulting from negligence, in the presence of the jury disclaims any claim for expenses for medical attendance, or loss of time, an instruction that if the jury find for plaintiff they may assess for plaintiff such damages as he has sustained, is not subject to objection by defendant on the ground that it does not point out the criterion by which the jury must be governed in fixing the amount of compensatory damages, nor does such instruction authorize the finding of punitive damages. *Kentucky etc. R'y Co. v. Ackley*, 480.
8. WHERE PERSONAL PROPERTY IS INJURED BUT NOT DESTROYED, loss of hire may be recovered as damages. But where the property is lost or destroyed by the negligent act of another, the measure of damages is the full market value of the property at the time of the loss, and interest thereon. *Atlanta Cotton-seed Oil Mills v. Coffey*, 244.
9. MEASURE OF DAMAGES FOR FURNISHING DEFECTIVE MACHINERY, under a contract to supply first-class machinery, is the difference between the contract price and the actual value of the machinery supplied. *Van Winkle v. Wilkins*, 299.
10. MEASURE OF DAMAGES FOR DETERIORATION IN VALUE OF COTTON SEED, caused by delay in furnishing and setting up machinery according to contract for grinding the seed, is the value of the seed before being damaged by delay and their value in their damaged condition. *Id.*
11. MEASURE OF. — NEW TRIAL OF ISSUE AS TO AMOUNT OF DAMAGES ORDERED in the particular case, unless the plaintiff should consent to take judgment for nominal damages merely. *Adams v. Chicago etc. R. R. Co.*, 644.

See ATTORNEY AND CLIENT, 3; CONTRACTS, 3; GUARDIAN AND WARD, 3; INTEREST; LIBEL AND SLANDER, 5; MASTER AND SERVANT, 1; RAILROAD COMPANIES, 10, 11; REPLEVIN, 2, 3; TELEGRAPH COMPANIES, 3.

DEBTOR AND CREDITOR.

CREDITOR HAS NO CLAIM UPON HIS DEBTOR'S SERVICES, and has no right to compel the debtor to work and earn money for his benefit, nor is he defrauded if the debtor chooses to work for another person gratuitously. *Elmer v. Conradt*, 641.

See HUSBAND AND WIFE, 7.

DECEIT.

See FRAUD, 12.

DEDICATION.

1. There is no form necessary for the dedication of lands for public use. All that is required is the assent of the owner of the land, and the fact of its being used for a public purpose intended by an appropriation. *County of Yolo v. Barney*, 152.
2. WHAT IS. — If a public building, such as a hospital, is erected upon land belonging to the county by the proper authorities, and is devoted to uses necessary to the character of the building and the purpose for which it is erected, such land is dedicated or put to a public use. *Id.*
3. LAND MUST BE REGARDED AS DEDICATED TO PUBLIC USE WHEN IT IS PURCHASED BY THE COUNTY FOR THE PURPOSE OF BUILDING A COUNTY HOSPITAL on a portion of it, and using the balance for the necessities of such hospital, and when the county, after such purchase, establishes and maintains a hospital thereon. The fact that the county had the right of revoking the use of the land, and applying it to other purposes, does not prevent the operation of the dedication. *Id.*
4. IRREVOCABLE DEDICATION OF LAND TO PUBLIC USE is not necessary to prevent an adverse possession thereof from ripening into prescriptive title. *Id.*

DEEDS.

1. CONSTRUCTION OF WORDS IN A DEED SHOULD BE THAT WHICH, ON A GENERAL VIEW of the instrument and of the intention of the parties, seems most likely to accomplish what they intended. *Post v. Weil*, 809.
2. WHERE A RESTRICTION IS INSERTED IN A DEED AGAINST UNDESIRABLE STRUCTURES OR BUILDINGS, it will be presumed that the restriction was inserted for the purpose of protecting rights which the grantor had in adjacent property. *Id.*
3. CONDITION SUBSEQUENT, WHAT IS NOT. — Mere words should not be deemed sufficient to constitute a condition, and to entail the consequence of the forfeiture of the estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and the necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was intended to accomplish, but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason. *Id.*
4. CONSTRUCTION OF DEED. — TECHNICAL WORDS MAY BE OVERLOOKED where they do not inevitably evidence the intention of the parties. The construction of clauses which might be interpreted either as conditions subsequent or as mere covenants must be against the conditions involving the forfeiture of the estate. *Id.*
5. COVENANTS AND CONDITIONS MAY BE CREATED BY THE SAME WORDS. — In order that a covenant shall be read from the words of the instrument, they need not be precise nor technical, nor in any particular form. Hence, whether words amount to a condition, a limitation, or a covenant may be a matter of construction, depending on the contract. *Id.*
6. THOUGH A DEED CONTAINED A CLAUSE AS FOLLOWS: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," this condition will not be construed as a condition subsequent, the failure to observe which will

forfeited the estate, but as a mere covenant for the protection of the interests of the grantor. The office of this clause is merely to restrain the generality of the preceding clauses by limiting the uses to which the premises might be put. *Id.*

7. PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO, CONTRADICT, OR VARY a writing, but is admissible to explain an ambiguity, whether latent or patent; as where a deed described the land conveyed thereby as being "parts" of certain lots, but not stating what parts, the deed itself, together with parol testimony, are properly admissible in evidence to show that the land covered by the deed was the same as that in controversy, and to which the claim was made. *Shore v. Miller*, 239.
8. DEED ABSOLUTE ON ITS FACE CANNOT BY PAROL EVIDENCE BE SHOWN TO HAVE BEEN GIVEN IN TRUST for the benefit of the grantor in the absence of fraud, accident, or mistake, or a fiduciary relation between the parties. *Feeney v. Howard*, 162.
9. RECITAL OF CONSIDERATION IN A DEED CANNOT BE DISPROVED for the purpose of raising a trust or defeating the operation of the instrument, in the absence of fraud or mistake. *Id.*
10. CONVEYANCE OF REAL ESTATE CANNOT BE SET ASIDE AS FOR A FAILURE OF CONSIDERATION, in the absence of fraud, on the sole ground that the promises and agreements which enter into its execution, and which by the terms of the contract under which a deed is made were not to be performed until after its execution, have not been performed. The fact that the promises were to make improvements, and to expend money in the development of the mine, which is the subject-matter of the conveyance, does not render this rule inapplicable. *Lawrence v. Gayetty*, 29.
11. QUITCLAIM. — Whether one who buys land and takes only a quitclaim title can be an innocent purchaser, is held to be in some doubt, and to be a question as to which the authorities are conflicting, and is not determined in the particular case. *Hockenull v. Oliver*, 233.
12. EXECUTION OF DEED WITH BOND FOR TITLE — PRECEDENCE OF LATER RECORDED DEED OVER PRIOR UNRECORDED ONE. — The owner of land who conveys it by warranty deed to secure an indebtedness, taking a bond for title from his creditor, the grantee, has no remaining interest in the land except the right to redeem it. And if, for a valuable consideration, he afterwards makes a second deed to his creditor, whereby he conveys all his right, title, and interest in and to the property, warranting it against himself and any person claiming under him, this is sufficient to convey a perfect title to the grantee, and such second deed is not void because it failed to describe the amount of interest that the grantor had in the land; and being recorded in time, it takes precedence over a prior deed not recorded in time. *Id.*

See APPEAL AND ERROR, 8; ESTOPPEL, 5; FRAUD, 1, 12.

DEMURRERS.

See PLEADING.

DESCENT AND DISTRIBUTION.

1. DEGREES OF KINDRED ARE COMPUTED IN INDIANA ACCORDING TO RULES OF CIVIL LAW, and the statute of descents covers every conceivable state of circumstances that can surround the descent of property. *Bruce v. Bissell*, 436.

2. **REAL ESTATE OF INTESTATE DESCENDS TO GREAT-GRANDMOTHER** under section 2471, Revised Statutes of 1881, as being "the next of kin in equal degree of consanguinity," in preference to a great aunt or uncle of the same paternal or maternal line. *Id.*
3. **HUSBAND INHERITS THE ENTIRE ESTATE OF HIS DECEASED WIFE** when she dies intestate, leaving no issue, father, mother, brothers, nor sisters, though she left surviving her children and grandchildren of a deceased sister. *In re Ingram*, 80.
4. **HEIR OR DONEE WHO MURDERED HIS ANCESTOR OR TESTATOR** to obtain the latter's property will not be permitted to have any benefit as such heir or donee. *Riggs v. Palmer*, 819.
5. **ESTATES OF DECEDENTS — BASTARD'S RIGHT OF INHERITANCE.** — The legitimate children of a bastard may inherit from the bastard brother of their parent, who dies after the death of such parent, under section 5, chapter 31, General Statutes of Kentucky, providing that bastards of the same mother are capable of inheriting and transmitting an inheritance on the part of each other, as if born in lawful wedlock of the same parents. *Sutton v. Sutton*, 476.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

See HUSBAND AND WIFE, 6.

DURESS.

See SURETYSHIP, 4.

EASEMENT.

HIGHWAYS. — Owner of lot abutting on public street in city has, as appurtenant to his lot, and independent of the ownership of the fee in the street, an easement in the street to the full width thereof, in front of the lot, for the admission of light and air thereto, which easement is subordinate only to the public right in the street. And depriving him of, or materially interfering with, his enjoyment of the easement for any public use not a proper street use is a taking of his property for public use within the meaning of the constitution. *Adams v. Chicago etc. R. R. Co.*, 644.

ELECTION.

1. **POWER OF CANVASSING BOARDS.** — Boards of ministerial officers, authorized to canvass the result of elections and declare the result as shown by returns made to them by inferior boards, cannot pass upon the illegality of the election or of votes cast thereat, nor set up the same as ground for resisting *mandamus* brought to compel them to make such canvass. *County Commissioners v. State*, 183.
2. **DUTY OF CANVASSING OFFICERS.** — A statute requiring inspectors of elections to canvass the votes cast, and "make due returns of the same to the county commissioners," imposes, by implication, upon the latter the duty of receiving and filing such returns when so made into their official custody and keeping. *Id.*

- 2. DUTY OF CANVASSING OFFICERS.** — Where a statute merely requires certain commissioners to receive and keep in their official custody election returns, the performance of such duty involves no consideration by them of the legality of the election, nor does it permit them to raise the question of such legality on *mandamus* as a reason for not performing such duty; nor does the performance of such duty decide or conclude the legality of the election, but merely preserves the evidence of the result as shown by the returns. *Id.*

EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS, 5.

EQUITY.

See MARRIED WOMEN, 1; MISTAKE; PARENT AND CHILD; SPECIFIC PERFORMANCE.

ESTOPPEL

1. **ARBITRATION AND AWARD.** — Where the name of a person is signed to a submission to arbitration, though he did not in fact sign it, but was present when the arbitration was had and the award made, and testified before the arbitrators, knowing that his rights were involved in the controversy, he is estopped from denying the correctness of the award, and a verdict to the contrary will be set aside and a new trial granted, where the court ignored the question of estoppel and did not charge the jury upon it. *Johnson v. Cochran*, 294.
2. **FAILING TO OBJECT TO IMPROVEMENTS MADE ON LAND BY ADVERSE CLAIMANT.** — If one attests a deed knowing its contents, and afterwards stands by and sees work performed and money expended on the premises, without objecting thereto, he is estopped from asserting an older adverse title in himself to the premises, and he cannot recover them in opposition to the deed to which his attestation gave authenticity and credit. *Georgia etc. R. R. Co. v. Strickland*, 282.
3. **ESTOPPEL TO DENY POWER OF CORPORATION TO CONTRACT, WHEN ARISES.** — Where a contract has been executed and fully performed on the part of a corporation or of the person with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation. *Wright v. Hughes*, 412.
4. **ESTOPPEL TO OBJECT TO SERVICE OF NOTICE OF APPEAL.** — If one who has been an attorney for the defendant in an action accepts service of notice of appeal after the death of such defendant, the party making such service being ignorant of such death, and if such attorney being afterwards retained by the representatives of the deceased defendant, by concealing the fact of such death, and by the failure to object to the jurisdiction of the appellate court at the proper time, and for the fraudulent purpose of preventing the proper service of such notice, delays making objection until it is too late to remedy the defect, the representatives of the deceased are estopped from contending that such notice was not properly served. *Moyle v. Landers*, 22.
5. **ESTOPPEL BY DEED.** — COVENANTS IN DEED CAN HAVE NO GREATER VALIDITY than the deed itself; and in order that such covenants may work an estoppel, the deed itself must be a valid instrument. *Alt v. Banholter*, 681.

6. RELIEF WILL NOT BE GRANTED FROM A JUDGMENT BROUGHT ABOUT BY THE CARELESSNESS of the injured party. *Champion v. Woods*, 126.
7. A WIFE IS NOT ENTITLED TO RELIEF FROM A DECREE OF DIVORCE OMITTING TO PROVIDE FOR HER PROPERTY RIGHTS, when she alleged in her complaint in the divorce suit that there was no common property, though she avers that she was caused to make such allegation by her reliance on the representation of her husband that he owned all the property which had been acquired by them during their marriage. It was inexcusable negligence on her part to rely on her husband's representations after their relations to each other became sufficiently hostile to occasion a suit for divorce, without making any effort to ascertain the law of the case from some other and less interested source. *Id.*

See JUDGMENTS, 8; MARRIED WOMEN, 3, 4; SALES, 2, 5-7.

EVIDENCE

1. SECONDARY EVIDENCE IS NOT ADMISSIBLE until the non-production of the primary evidence has been sufficiently accounted for, and this rule applies to a bond for titles relied upon in an action for the recovery of land. *Georgia etc. R'y Co. v. Strickland*, 282.
2. IN AN ACTION BY THE OWNER AGAINST THE PURCHASER, conversations and declarations which were a part of the *res gestæ* of the swap and its incidents, or of the subsequent tort, are admissible in evidence, to show how the plaintiff acquired title and possession, and how he lost possession without parting with title. *Cook v. Pinkerton*, 297.
3. JUDICIAL NOTICE. — That alcohol is an intoxicating, spirituous liquor need not be proved; the court knows it. *Snider v. State*, 350.
4. EXPERT EVIDENCE. — THE OPINION OF A MEDICAL WITNESS, HAVING KNOWLEDGE OF THE CASE, AS TO THE PROBABILITY OF THE PLAINTIFF'S RECOVERY, is admissible in evidence in an action for damages for personal injuries received by plaintiff from defendant's negligence. *Griswold v. New York etc. R. R. Co.*, 775.
5. EXPERT TESTIMONY. — Where land is claimed to have been sold as a whole, but there is evidence that, in arriving at the price, the parties had considered the acreage, the value per acre is then relevant; and a real estate broker, of many years' experience in the general business, and having a specific knowledge of values in the immediate neighborhood of the property in dispute, is competent to testify as an expert, and his opinion as to the value per acre of the land is admissible. *Griswold v. Gebbie*, 878.

See CORPORATIONS, 9; HUSBAND AND WIFE, 1.

EXCHANGE OF PROPERTY.

See SALES, 15, 16.

EXECUTIONS.

1. PROPERTY SUBJECT TO. — SEATS OR MEMBERSHIPS IN A STOCK AND EXCHANGE BOARD or a produce exchange are subject to execution, though the constitution and by-laws of the association declare the legal title and exclusive ownership of the property of the association to be vested in certain officers, "in trust for the benefit and enjoyment of its members"; that "no member under any circumstances shall be deemed to have, or claim, or possess any individual right, title, or interest in the

property or assets of the association, except when the same shall be finally dissolved and its affairs wound up by its then remaining members"; that every application for membership is subject to the scrutiny of a committee, and also to be rejected by the negative votes of twenty members; that a member may be expelled for joining any similar association in the city; and that "it is distinctly understood and agreed between the board and each member thereof that the board reserves the right to reject any nominee." *Habenicht v. Lissak*, 63.

2. **A PROPER MODE OF SUBJECTING TO EXECUTION A SEAT OR MEMBERSHIP IN A STOCK BOARD** or produce exchange is by the appointment of a receiver in proceedings supplemental to execution, and directing the defendant to transfer to such receiver his interest in such seat or membership. *Id.*
3. **EXEMPTION. — WAGES OF ONE EMPLOYED AS A STENOGRAPHER OR PRIVATE SECRETARY** are exempt from execution under the code of Georgia, which declares that all journeymen, mechanics, and day-laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly, or monthly wages, whether in the hands of their employers or others. *Abrahams v. Anderson*, 274.

See DAMAGES, 5; HOMESTEAD, 4; LANDLORD AND TENANT, 2, 6-8.

EXECUTORS AND ADMINISTRATORS.

1. **SALES — REPRESENTATIONS OF TITLE — PURCHASER.** — An executor's representations as to the title of land he is about to sell, though made in good faith, fixes no liability upon the estate nor upon himself. He cannot warrant the title, and a purchaser at such sale is bound by the rule *caveat emptor*, and bound for the amount bid. *Wells v. Harper*, 310.
2. **PURCHASER OF REAL ESTATE AT ADMINISTRATOR'S SALE ACQUIRES NO TITLE TO CORD-WOOD** thereon at the time of the sale, nor to growing crops which were sowed and planted by the heirs of the decedent, or their tenants, after the death of the decedent. *Barrett v. Choen*, 363.
3. **PERSONS MADE PARTIES, AS HEIRS, TO PROCEEDING BY ADMINISTRATOR TO SELL** real estate of his intestate are only affected by the proceeding in their capacity as heirs. *Id.*
4. **HEIRS NOT BOUND BY STATEMENTS MADE BY ADMINISTRATOR AT SALE, WHEN.** — A statement made by an administrator at a sale of the real estate of his intestate, that the crops thereon are not reserved, cannot prejudice the rights of the heirs of the decedent in crops that were sowed and planted by them or their tenants after the intestate's death. *Id.*
5. **INFANTS INTERESTED IN ESTATE NOT AFFECTED BY CONDUCT AND DELAY OF GUARDIAN IN CALLING EXECUTORS TO ACCOUNT.** — Minor children of deceased partner are not affected by such conduct and delay on the part of the widow, who was their guardian, as might bar her personally from holding the executors responsible for selling the interest of the decedent in the partnership assets to the surviving partner for less than its value; but it is their right, under the Massachusetts Public Statutes, chapter 144, section 9, to have the accounts of the executors opened to correct any errors therein. *Denholm v. McKay*, 574.
6. **LIABILITY FOR LOSS BY THEFT.** — Where an executor is negligent and does not exercise ordinary care, he is personally liable for the loss of money belonging to the estate, by theft of the same from his person by pick-pockets, while traveling upon a street-car in a city. *Tarver v. Torrance*, 311.

See PARTNERSHIP, 2, 4.

EXPERT TESTIMONY.

See EVIDENCE, 4, 5.

EXEMPTIONS.

See EXECUTIONS, 3; HUSBAND AND WIFE, 5; JURISDICTION.

FEES AND SALARIES.

See ATTORNEY AND CLIENT, 1; CHAMPERTY, 1.

FENCES.

1. **USE OF ONE'S OWN PROPERTY — ERECTION OF HIGH FENCES.** — One has a right at common law, it seems, to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. *Rideout v. Knox*, 560.
2. **CONSTITUTIONAL LAW — POLICE POWER — ACT DECLARING HIGH FENCES PRIVATE NUISANCES.** — Statute is constitutional, both as to existing and future fences and structures, which declares that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," shall be a private nuisance, and which provides that the injured adjoining owner or occupant may have an action therefor. *Id.*
3. **FENCES — ACT DECLARING HIGH FENCES PRIVATE NUISANCES — EXISTENCE OF MALEVOLENCE AS DOMINANT MOTIVE.** — Malevolence must be the dominant motive in the erection or maintenance of a fence or other structure, without which it would not have been built or maintained, in order to give a right of action under a statute which declares that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," shall be a private nuisance, and which provides that the injured adjoining owner or occupant may have an action therefor. *Id.*

See HUSBAND AND WIFE, 3.

FILING.

See OFFICE AND OFFICERS, 5.

FINDINGS.

See APPEAL AND ERROR, 10.

FIXTURES.

RIGHT TO REMOVE BUILDING ERECTED UNDER LICENSE ON ANOTHER'S LAND. — One who erects a building upon the land of another by his license is regarded as continuing to be the owner of the building, and entitled to remove it, if it be practicable, and works no serious injury to the land, provided the consideration of the case be uninfluenced by the unreasonable laches of the licensee, or by other special circumstances. And in such case, the licensee is entitled to a reasonable opportunity to remove the building upon revocation of the license. *Ingalls v. St. Paul etc. R'y Co.*, 676.

FRAUD.

1. **MISREPRESENTATIONS, TO CONSTITUTE SUFFICIENT GROUNDS FOR ORDERING THE CANCELLATION OF A DEED,** must be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future. *Lawrence v. Gayetty*, 29.
2. **DECEPTION AS TO MATTERS OF LAW GENERALLY AFFORDS NO GROUND FOR RELIEF,** unless the transaction is between parties holding fiduciary or confidential relations, and one of them who has superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage over the other, who is ignorant, and has not been in a position to become informed. *Champion v. Woods*, 126.
3. **MERE MISSTATEMENT OF QUANTITY OF LAND SOLD IS NOT SUFFICIENT TO PROVE FRAUD;** but where the deficiency is very great, and the misstatement is made by advertisement and by descriptive circular, and is repeated twice orally in response to the direct questions of the intended purchaser, and is unexplained by the agent making it, there is a *prima facie* case to go to the jury, though the principal was absolutely ignorant on the subject. *Griswold v. Gebbie*, 878.
4. **MERE FAILURE TO PERFORM A PAROL AGREEMENT** made in good faith is not fraud. *Feeney v. Howard*, 162.
5. **MERE PROMISE IS NOT, STRICTLY SPEAKING, A REPRESENTATION.** *Lawrence v. Gayetty*, 29.
6. **MAKING A PROMISE WITH NO INTENTION AT THE TIME OF PERFORMING IT** constitutes a fraud for which a contract may be rescinded. *Id.*
7. **MERE FAILURE TO PERFORM A COVENANT DOES NOT RELATE BACK** to and render the same fraudulent. *Id.*
8. **IF THE MEANS OF KNOWLEDGE ARE AT HAND, AND EQUALLY AVAILABLE TO BOTH PARTIES,** and the subject-matter is open to the inspection of both alike, and there are no fiduciary or confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party. *Champion v. Woods*, 126.
9. **FRAUD WHICH WILL PREVENT POSSESSION OF PROPERTY FROM BEING FOUNDATION OF PRESCRIPTION** must be positive or actual fraud, and not constructive or legal fraud, and the jury must determine whether or not there was positive fraud. *Salter v. Salter*, 249.
10. **FRAUDULENT INTENTION IS A MATERIAL INGREDIENT OF ACTUAL FRAUD,** AND MUST BE ALLEGED as one of the facts constituting the fraud. *Feeney v. Howard*, 162.
11. **PLEADING. — THE FACTS CONSTITUTING FRAUD MUST BE AVERRED IN CASES OF CONSTRUCTIVE** as well as of actual fraud; and if the pleader relies upon fiduciary relations of the parties as one of the elements of constructive fraud, he should aver it. *Id.*
12. **IN ACTION OF DECEIT, SCIENTER MUST NOT ONLY BE ALLEGED, BUT PROVED;** and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. But the plaintiff in such action has made out a *prima facie* case, without direct proof of deceitful intent, when he has proved that the defendant made a positive statement of a material fact, its falsity, and the circumstances under which

it was made, tending to show a reckless assertion in conscious ignorance of the fact. *Grinbold v. Gebbie*, 878.

See ASSUMPT; ATTORNEY AND CLIENT, 4, 5; BANKS AND BANKING, 12; DEEDS, 9, 10; HUSBAND AND WIFE, 4, 7; SALES, 1.

FRAUDULENT CONVEYANCES.

TRANSFER IN FRAUD OF CREDITORS — RECOVERY OF PROCEEDS OF PROPERTY. — Debtor, who transfers property with intent to delay and defraud his creditors, to a third person who has knowledge of the fraud, upon an agreement that the proceeds shall be accounted for to him, may, after notice to such third person of the abandonment of his fraudulent purpose and demand of repayment, recover from him such proceeds for the benefit of his creditors. *Carll v. Emery*, 515.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GRAND JURY.

See CRIMINAL LAW, 4-7.

GROWING CROPS.

See EXECUTORS AND ADMINISTRATORS, 2, 4; VENDOR AND VENDEE, 4.

GUARDIAN AND WARD.

1. GUARDIAN OUGHT NOT TO BE SURCHARGED WITH MONEY to which his ward is entitled, but which never came into the hands of the guardian, unless he has been guilty of gross negligence. *Landmesser's Appeal*, 854.
2. GUARDIAN IS NOT LIABLE FOR MONEY OF HIS WARD'S ESTATE, where, having placed a claim in the hands of an attorney, at the time in good standing, for collection, the attorney collected and embezzled the money, and the guardian took his judgment note for the amount, but made no attempt to collect it by legal means, because of the maker's insolvency. The fact that the guardian declined to incur costs and expenses in a fruitless effort to enforce payment by the ordinary remedies, or to apply for a rule or to institute a criminal prosecution against the attorney, did not constitute such negligence as would warrant a surcharge of the amount of the note. *Id.*
3. FOR WRONGFUL DEATH OF HIS INFANT WARD, guardian has no right of action, except to reimburse the ward's estate for expenditures made for care and medical attendance, or for funeral expenses; the right of action for general damages for loss of service during minority is in the father or mother. *Louisville etc. R'y Co. v. Goodykoontz*, 371.

See EXECUTORS AND ADMINISTRATORS, 5; INFANTS, 2.

HIGHWAYS.

WHO HAVE RIGHTS OF TRAVELERS. — One who is unloading a wagon in a street in a reasonable and proper manner is to be considered as a traveler, so as to entitle him to recover for injuries caused by snow falling from a building. *Smethurst v. Proprietors etc. of Cong. Church*, 550.

See EASEMENTS.

HOMESTEAD.

1. IF A DIVORCE IS GRANTED TO A WIFE AFTER HER HUSBAND HAS MADE HER A CONVEYANCE OF THEIR HOMESTEAD, and the decree is silent with respect to the disposition to be made of such homestead, her title thereto becomes absolute as against him. *Burkett v. Burkett*, 58.
2. A HUSBAND MAY CONVEY THEIR HOMESTEAD TO HIS WIFE without her joining in the deed. Such conveyance operates to vest her with title in fee and in severalty to the property, but does not otherwise affect its homestead character. *Id.*
3. IN APPRAISING A HOMESTEAD IN PROCEEDINGS UNDER EXECUTION, it is the value of the premises, and not the defendant's estate therein, which must be considered. The quantity of land to be set off cannot be increased because the defendant's estate is for life only, or is for any reason less valuable than an estate in fee. If the premises can be divided without material injury, the life tenant cannot require that they be sold as an entirety, and that five thousand dollars of the proceeds be paid to him. *Brown v. Starr*, 180.
4. MORTGAGE OF HOMESTEAD NOT SIGNED BY WIFE OF MORTGAGOR IS INVALID. — A mortgage (not for purchase-money) of his homestead by a married man without his wife's signature is absolutely void, and is not rendered valid by subsequent abandonment of the homestead, nor by the fact that the husband and wife are subsequently divorced. And the covenants of title in such a mortgage will not operate as an estoppel by deed against the mortgagor or his assigns. *Alt v. Banholzer*, 681.

See PUBLIC LANDS, 1.

HUSBAND AND WIFE.

1. EVIDENCE — DECLARATION OF WIFE IN HUSBAND'S ABSENCE. — Wife's declarations in her husband's absence, tending to charge the husband with a liability, are not evidence against him. *Rideout v. Knox*, 560.
2. HUSBAND IS NECESSARY PARTY TO BILL FILED BY WIFE setting up her equity in her father's estate before it had been reduced to possession. The bill being filed to prevent his marital rights from attaching, unless he was made a party, the decree could not affect him. But creditors who were parties to the bill would be bound by the decree, although the husband was not made a party. *Salter v. Salter*, 249.
3. CONTRACT BY WIFE TO SUPPORT HUSBAND, VOID WHEN. — A contract by which a wife, in consideration of a conveyance to her of real estate by her husband, agrees to support him during his natural life, is void, and the husband cannot maintain an action to recover damages for the breach thereof. *Corcoran v. Corcoran*, 390.
4. CONVEYANCE OF PROPERTY FROM HUSBAND TO WIFE IS PRESUMABLY VOLUNTARY SETTLEMENT, or provision for her benefit, and will, if reasonable, be upheld against the husband and his heirs, unless obtained by fraud or undue influence. *Id.*
5. A WIFE WHO ABANDONS HER HUSBAND, and for several years before his death renounces all conjugal intercourse, without such reasonable cause as would entitle her to a divorce, is not entitled to the exemption of three hundred dollars out of his estate provided by the Pennsylvania exemption act of April 14, 1851, P. L. 613, for the benefit of a decedent's family. *Nye's Appeal*, 873.

6. **WIFE'S DOWER RIGHT IN HER DECEASED HUSBAND'S ESTATE DOES NOT DEPEND** upon the existence of the family relation at his death, and is not barred by her willful desertion of her husband in his lifetime without reasonable cause. *Id.*
7. **WORK PERFORMED BY HUSBAND ON WIFE'S LANDS—RIGHTS OF CREDITORS.**—The defendant's insolvent husband joined with her in the execution of notes given for the purchase price of two lots, and in the mortgage executed to secure the same. He also paid one year's taxes on the lots, and one year's interest upon the joint notes, and had worked as a carpenter upon a house built by the defendant on one of the lots, paying for part of the materials. He further personally performed all of the carpenter-work upon a dwelling-house erected upon the other lot, the statutory homestead of the defendant. Out of the proceeds of the sale of the first-mentioned house and lot, the defendant paid for both lots, and thereby secured the discharge of the notes and mortgage. In such case, in the absence of a finding of any fraudulent intent by the husband and wife to cheat and defraud the husband's creditors, a judgment declaring that the defendant held the legal title to the remaining house and lot in trust for the plaintiff, and directing its sale to satisfy a judgment against the husband, could not be sustained. *Eilers v. Conradt*, 641.
8. **FENCES—ACT DECLARING HIGH FENCES PRIVATE NUISANCES—EVIDENCE OF MAINTENANCE.**—Assistance given by a husband in building a fence on his wife's land does not make him liable therefor, and does not tend to prove that he maintains the fence, where it was given before the passage of an act declaring that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," should be a private nuisance, and providing that the injured adjoining owner or occupant may have an action therefor. *Rideout v. Knox*, 560.

See DESCENT AND DISTRIBUTION, 3; HOMESTEAD, 2, 5; LIBEL AND SLANDER, 3; MARRIED WOMEN.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

1. **CHARACTER OF LABOR TO BE REQUIRED OF BOY TEN YEARS OF AGE**, without experience, who is employed to perform labor, is implied to be such as is within the compass of his age, capacity, and experience. *Brazill Block Coal Co. v. Gaffney*, 422.
2. **WHAT AMOUNTS TO COMPULSION IN CASE OF BOY TEN YEARS OLD** who is ordered by men having authority to direct him to perform a hazardous service is a question for the jury. *Id.*
3. **GUARDIAN AS PARTY—INFANT NOT BOUND BY DECREE.**—A decree rendered in a suit in equity, affecting the rights of an infant, whose guardian was a party to the bill individually but not as guardian, does not bind the infant. *Salter v. Salter*, 249.

See DAMAGES, 6; MASTER AND SERVANT, 10, 11; NEGLIGENCE, 9, 10, 15.

INJUNCTION.

1. **DENIAL OF BILL FOR INJUNCTION.** — Where it is apparent from the bill for an injunction that there is no ground for relief, the bill may be dismissed at the hearing for the preliminary injunction without requiring the defendant to answer. *Sauls v. Freeman*, 190.
2. **REMEDY — RAILROAD COMMISSIONERS.** — The discretionary action of executive officers will not be enjoined. Some other remedy must be sought; and where railroad commissioners are, by statute, vested with discretionary powers as to fixing rates of freight and passenger tariff, they are within this rule. *McWhorter v. Pensacola etc. R. R. Co.*, 220.
3. **REMEDY — RAILROAD COMMISSIONERS.** — Where a statute provides that railroad commissioners shall fix rates of freight and passenger tariff, the question whether such rates are unreasonable and unjust, and the statute therefore unconstitutional and void, cannot be inquired into in a suit to enjoin their discretionary action in fixing such rates. *Id.*

See NUISANCES, 5.

INSTRUCTIONS.

See TRIAL, 3.

INSURANCE.

1. **POLICY OF INSURANCE, WHEN SEVERAL AND DIVISIBLE.** — Where property insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy is to be regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is to be regarded as several and divisible. Where, therefore, a policy covers a barn and its contents, and a dwelling-house and its contents, it is several and divisible as regards the barn and the house; and false representations as to the condition of the house will not avoid the policy as to the barn and its contents. *Phoenix Ins. Co. v. Pickel*, 393.
2. **THE MINDS OF THE INSURER AND THE INSURED MUST MEET AS TO THE SUBJECT-MATTER.** Hence if the insurer acted on an application describing one house, and issued a policy thereon, the insured cannot recover under such policy for the loss of another house, which was one he intended to have taken insurance upon, on the ground that he applied for an insurance on the latter, but the agent of the company, by mistake, described the former in the application. *Sanders v. Cooper*, 801.
3. **IF A CONTRACT OF INSURANCE RELATES TO ONE DEFINITE AND DISTINCT SUBJECT,** it cannot be turned into a contract for the insurance of another and different subject on proof that the agent of the company by mistake described the wrong property in his application, especially if his authority is confined to making surveys and taking applications for insurance. *Id.*
4. **THE SUBJECT-MATTER OF AN INSURANCE MUST BE ASCERTAINED FROM THE DESCRIPTION IN THE POLICY,** and such extrinsic evidence as may be necessary to identify the property described, but such evidence cannot be received for the purpose of proving that the property was other and different from that described in the policy. *Id.*
5. **KNOWLEDGE OF PRIOR INSURANCE WILL NOT BE IMPUTED TO AN INSURED BECAUSE HIS AGENT** was put upon inquiry, or might by the exercise of

diligence have ascertained the truth. It is not an agent's duty to ascertain the fact as to prior insurance, and his assumption that such insurance did not exist does not bind his principal. *Id.*

6. **PRIOR INSURANCE. — IF AN AGENT KNOWS OF A PRIOR INSURANCE WHICH HE MISTAKENLY BELIEVES TO HAVE EXPIRED,** and acting under such belief procures a second policy on the same property, which contains a condition that it shall be void if the insured "shall have any insurance on the property hereby insured, not indorsed, known, or consented to by this company, or its authorized agent, in writing, this policy shall be void," this pre-existing policy is a breach of the condition, and avoids the second policy. *Id.*
7. **CONDITION AGAINST ENCUMBRANCES IN POLICY OF INSURANCE, HOW CONSTRUED. —** Where a policy of insurance contains a provision that "if the property shall hereafter become mortgaged or encumbered, this policy shall be null and void," this provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law. *Phoenix Ins. Co. v. Pickel*, 393.
8. **TO AVOID POLICY OF INSURANCE ON ACCOUNT OF BREACH OF WARRANTY** as to the value of the property insured, there must be a substantial breach. *Id.*
9. **COMPLAINT ON POLICY OF INSURANCE STATES CAUSE OF ACTION,** where it alleges that the property insured was the property of the plaintiff at the time of the issuance of the policy; that it was on his premises when it was destroyed by fire; that he was damaged to the value of the property; and that he had performed all the terms of the contract on his part. *Id.*
10. **OCCUPANCY OF PROPERTY INSURED, WHAT IS SUFFICIENT ALLEGATION OF, IN COMPLAINT. —** A complaint in an action on a policy of insurance covering a barn, farming implements, hay, grain, stock, etc., which alleges that on a certain day the barn and the other property insured and in the barn at the time were destroyed by fire sufficiently shows that the building was occupied at the time of its destruction. *Id.*
11. **BURDEN OF PROOF IN ACTION ON POLICY OF INSURANCE. —** In an action on a policy of insurance, it is sufficient for the plaintiff to show fulfillment of the conditions of recovery which are made such by the contract itself, and the burden is then upon the defendant to prove the untruthfulness of the representations, if there be any such, upon which he relies. The plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts. *Id.*
12. **PROOF OF FACTS DEHORS POLICY OF LIFE INSURANCE INADMISSIBLE TO CONTROL ITS LEGAL EFFECT. —** One who accepts a policy of insurance issued to him upon the life of another will not be permitted to allege and prove a state of facts *dehors* the writing to control its legal effect. *Burton v. Connecticut Mut. Life Ins. Co.*, 405.
13. **INSURABLE INTEREST MUST BE ALLEGED IN COMPLAINT ON POLICY OF LIFE INSURANCE. —** The plaintiff in an action on a life insurance policy issued to him upon the life of another must allege in his complaint that he had an insurable interest in the life of the person insured. *Id.*
14. **GRANDCHILD HAS NOT INSURABLE INTEREST IN LIFE OF GRANDFATHER. —** As a rule, a grandfather is under no legal obligation to support his granddaughter; and in an action by her upon a policy of insurance issued directly to her upon the life of her grandfather, the court cannot infer,

as a matter of law, from an averment of the relationship between the parties, such an insurable interest in the life of the grandfather as will uphold the policy. *Id.*

15. ACCIDENTS ARE OF TWO KINDS: 1. Those that befall a person without any human agency; 2. Those that are the result of human agency. The latter may be classified as, — 1. Those which happen to a person by his own agency; and 2. Those which befall a person by the agency of another person, without the concurrence of the latter's will; 3. Those which a person intentionally does, whereby another is unintentionally injured; 4. When one person intentionally injures another, not in a rencounter, or as the result of the misconduct of the person injured, nor foreseen by him. *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, 484.
16. ACCIDENT. — DEATH BY BEING WAYLAID AND ASSASSINATED authorizes a recovery under a policy insuring the person so killed against death "through external, violent, or accidental means." *Id.*
17. LIFE INSURANCE — CONDITION AGAINST INTENTIONAL INJURIES INFLICTED BY OTHERS. — A condition in a life insurance policy, that no claim shall be made under the policy when death or injury is caused by intentional injuries inflicted by the assured or any other person, bars a recovery where the assured is waylaid and assassinated for the purpose of robbery. *Id.*
18. VOLUNTARY EXPOSURE TO DANGER, WHAT IS. — It is "voluntary exposure to unnecessary danger, hazard, or perilous adventure," for a person with two packages in his hands or arms to attempt, by choice, on a dark and stormy night, to walk over a trestle which he knows to be dangerous, other ways of travel being open to him; and this is so, although it was his usual way of travel and his usual route to his home, and many others traveled that way. *Travelers' Ins. Co. v. Jones*, 270.
19. SUICIDE BY ASSURED TO AVOID ARREST AND TRIAL FOR CRIME. — A policy of life insurance provided that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void." The assured, in order to escape arrest for the crime of forgery in Minnesota, fled to Canada, where he was discovered and apprehended, and thereupon, to avoid being taken back to Minnesota for trial, shot and killed himself. In such case his death cannot be treated as the proximate result of his alleged crime, and the fact of his suicide is not in itself to be construed as occurring in or growing out of a violation of law, within the meaning of the policy. *Kerr v. Minnesota etc. Ass'n*, 631.
20. SUICIDE AS DEFENSE TO ACTION ON POLICY. — In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for the forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy. *Id.*
21. IMMEDIATE NOTICE, WHAT IS — PROOFS OF LOSS. — The terms of an accident policy contracted for "immediate written notice" of the accident to be given the association, and for "proofs of loss," the effect of the accident, to be furnished within six months thereafter. In construing these terms, the word "immediate" must be taken to mean within a reasonable time after the injury, under all the facts and circumstances of the case; and what is a reasonable time is for the jury to decide, unless the delay has been so great that the court may rule it as

a question of law. The proofs of loss, in such case, may be read in evidence for the purpose of showing that such proofs had been made in compliance with the terms of the policy, but if offered as evidence of the plaintiff's claim, their admission would be error. *People's etc. Ass'n v. Smith*, 869.

22. **MUTUAL BENEFIT ASSOCIATION — NON-PAYMENT OF ASSESSMENT.** — Where the assured in a mutual benefit association died on the twenty-seventh day of July, and he had until the tenth day of the following August in which to pay the last assessment made by the association, he was not in default, and the policy was still in force at the time of his death, and the liability of the association was accordingly fixed, and was unaffected by the fact that no part of such assessment was paid on the date last mentioned. *Kerr v. Minnesota etc. Ass'n*, 631.
23. **CONSTRUCTION OF CONTRACT OF INSURANCE MADE BY MUTUAL BENEFIT ASSOCIATION,** and the amount of recovery to which the beneficiary was entitled under the terms of the contract, determined. *Id.*

INTEREST.

VERDICT — INTEREST. — Where a verdict is for a certain amount with interest, no time being specified from which interest is to be computed, it should be counted from the time of maturity of the written contract declared upon, when the amount found is less than the last installment of the purchase price due on such contract. *Van Winkle v. Wilkins*, 292.

See DAMAGES, 2.

JUDGES.

See TRIAL, 1, 2.

JUDGMENTS.

1. **A JUDGMENT RECOVERED IN AN ACTION FOR A TORT** is not assignable before it comes into being, that is, before it has been rendered or entered up, although a verdict has been returned upon which judgment can be and is afterwards signed. The plaintiff acquires title, not by the verdict, but by the judgment, and until its rendition he has no title to assign; until then his action for the tort is not terminated, but is still pending and in progress. *Gamble v. Central R. R. and Banking Co.*, 276.
2. **VOID JUDGMENT NOT RENDERED VALID BY APPEARANCE OF PARTY.** — An appearance by a party in court, after the rendition of a judgment which is absolutely void for want of jurisdiction in the cause, is ineffectual to render that judgment valid. *Godfrey v. Valentine*, 657.
3. **IDENTITY OF SUBJECT-MATTER OF ACTION — EVIDENCE.** — The complaint in an action commenced in the district court of the state described the lands constituting the subject-matter of the action as being in "Bottineau's addition to Minneapolis." The action was removed to the circuit court of the United States, and the certified complaint in the latter court designated the lands as being in "Bottinen's addition to Minneapolis." In such case, the word "Bottinen" instead of "Bottineau," in the certified complaint in the circuit court, is to be deemed the result of clerical error, and the record in the circuit *prima facie* as applicable to the land in question in "Bottineau's addition." *Pierre v. St. Paul etc. R'y Co.*, 673.

4. **RES JUDICATA.** — **FORMER RECOVERY FOR USE** and occupation, in an action to recover possession of the land, is a bar to a subsequent action for injuries to the estate during the same period of occupation. *Id.*
 5. **RES JUDICATA.** — Where proper representatives of a county fail to avail themselves of any legal defense to a writ of *mandamus*, the people of the county generally are precluded by the judgment thereon, in the absence of fraud or collusion between any of the parties. *Sauls v. Freeman*, 190.
 6. **RES JUDICATA.** — **JUDGMENT AGAINST A COUNTY** or its legal representatives in a matter of general interest to the people thereof concludes not only the parties named as defendants, but also all the citizens of the county not so named. *Id.*
 7. **RES JUDICATA.** — **JUDGMENT ON MANDAMUS** directing the proper officers to call an election on the question of changing a county site concludes the voters or citizens of the county, other than the relators, from instituting proceedings to prevent such officers from removing county records to the county site chosen at such election, when the matter set up might have been interposed as a defense in the *mandamus* proceeding. *Id.*
 8. **RES JUDICATA.** — In an action on a promissory note, the plaintiff is not estopped nor precluded from recovering by a former judgment declaring that a previous confession of judgment on the same note was fraudulent and void, and ordering such judgment to be set aside. *Smith v. Los Angeles etc. Ass'n*, 53.
- See** ABATEMENT; ATTACHMENT AND GARNISHMENT, 3; ATTORNEY AND CLIENT, 6; CO-TENANCY, 3; ESTOPPEL, 6; EXECUTORS AND ADMINISTRATORS, 3; JUDICIAL SALES, 2; LANDLORD AND TENANT, 2.

JUDICIAL SALES.

1. After confirmation of a judicial sale of real estate the rule *caveat emptor* applies, and the purchaser cannot successfully resist the payment of the purchase price on the ground that he acquired no title, unless he can show that he was induced to make the purchase by misrepresentations of the creditor, or person making the sale, as to the condition of the title, and that he did not discover, and could not have discovered with due diligence, the true condition of the title until after such confirmation. *Williams v. Glenn*, 461.
2. **SALE UNDER REVERSED JUDGMENT.** — If, in a suit to foreclose one mortgage, in which the mortgagors and the holder of another mortgage are made parties defendant, a decree of foreclosure is entered from which the mortgagee defendant appeals, and obtains a reversal on the ground that the court erred in determining the priorities of the respective mortgages, to which appeal the mortgagors, however, were not parties, the judgment of reversal does not affect the sale of the mortgaged premises made to the plaintiff before such reversal, the execution of the judgment not having been stayed pending the appeal; and the plaintiff, having obtained a sheriff's deed pursuant to the sale, holds title paramount to that of the other mortgagee. *Withers v. Jacks*, 143.
3. **PURCHASER AT AN EXECUTION SALE HAS, BEFORE THE TIME FOR REDEMPTION EXPIRES,** an interest in the property in the nature of a lien thereon, and is therefore entitled to the rights and remedies of a lien-holder. *Swain v. Stockton Savings etc. Soc.*, 118.
4. **SUBROGATION.** — **PURCHASER AT AN EXECUTION SALE,** though the time in which redemption can be made has not expired, is entitled to be sub-

rogated to a trust deed existing at the time of the sale upon paying to the holder thereof the amount due from the defendant in the execution. *Id.*

See CONTRACTS, 5; EXECUTORS AND ADMINISTRATORS, 1-4.

JURISDICTION.

THE PRESUMPTION IS IN FAVOR OF THE LOCAL JURISDICTION of the ordinary granting an exemption; and in this case there was no evidence to overcome such presumption, nor any whatever in conflict with it. *Gamble v. Central R. R. & B. Co.*, 276.

See ATTACHMENT AND GARNISHMENT, 2; JUDGMENTS, 2; PROCESS, 1.

JUSTICES OF THE PEACE.

See APPEAL AND ERROR, 5.

LACHES.

See CORPORATIONS, 11, 12; PARTNERSHIP, 3.

LANDLORD AND TENANT.

1. TENANT, AND NOT LANDLORD, IS LIABLE TO THIRD PERSONS FOR ANY ACCIDENT OR INJURY OCCASIONED to them by the premises being in a dangerous condition, unless the landlord has contracted with the tenant to repair, or has let the premises in a ruinous condition, or expressly licensed the tenant to do the acts amounting to a nuisance. *Ahern v. Steele*, 778.
2. PRIORITY OF JUDGMENT LIEN ON RENTER'S CROP. — Where the landlord furnishes the land and supplies to make the crop, and keeps a general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for his work, the laborer is a cropper, and judgments or liens cannot subject his part of the crop until the landlord is fully paid. But where there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a parol contract with the tenant by which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid off. The landlord may protect himself in such case through the lien which the law gives him for supplies. *Almand v. Scott*, 241.
3. TENANT HAS AN INTEREST SUBJECT TO EXECUTION IN WHEAT RAISED BY HIM UNDER A LEASE, in which he agrees, after thrashing and harvesting such wheat, to deliver the whole thereof to the lessor, and the lessor agrees upon such delivery that he will immediately deliver and transfer two thirds of the same to the lessee, and that until such delivery said wheat shall be the property of the lessor, and the lessee shall have no right to dispose of or to encumber any portion thereof. *Farnum v. Hefner*, 174.
4. FOR THE LANDLORD TO GO UPON THE RENTED PREMISES before the year has expired, break open a locked outhouse, and take therefrom the tenant's cotton, against his protest and remonstrance, is a trespass for which punitive damages may be awarded, even though the cotton be bound for supplies which the landlord has furnished, and though such forcible seizure of it be made for the purpose of selling it, and though it be fairly sold, and the proceeds applied to the debt for supplies. *Shores v. Brooks*, 332.

5. **WHERE THE TENANT, AFTER SELLING TO HIS LANDLORD SOME OF HIS EFFECTS,** locks them up in a house in his possession on the premises, and of which he is entitled to the use, and the landlord, on finding the house locked, puts another lock on it, not calling upon the tenant to surrender the property sold, and after keeping the house thus locked for several days, excluding the tenant from entering or using it, breaks open the house, and takes therefrom the property which he has purchased, up to this time having made no demand upon the tenant to deliver it, this also is a trespass for which punitive damages may be awarded. *Id.*
6. **FORFEITURE OF LEASE DOES NOT RESULT FROM AN INVOLUNTARY TRANSFER OF THE LEASEHOLD INTEREST,** as by sale under execution, — bankruptcy or the like, — though the lease contains a covenant that the lessee will not underlet any part of the premises nor assign the lease without the written assent of the lessor. If the landlord desires to avoid any such involuntary transfers, he may provide expressly that such a transfer of the property shall work a forfeiture. *Farnum v. Hefner*, 174.
7. **THOUGH A LEASE SHOWS THAT IT IS THE INTENTION OF THE PARTIES THAT THE TENANT SHALL HIMSELF OCCUPY THE PREMISES,** it will not be forfeited by a sale of his interest under execution. *Id.*
8. **A LEASE CANNOT BE FORFEITED BY A WRITTEN AGREEMENT OF FORFEITURE EXECUTED BY THE TENANT AFTER AN EXECUTION LIEN HAS ATTACHED,** because the sale under such lien will relate back to its inception, and thus transfer the lessee's title as of a date anterior to such forfeiture. *Id.*

See NEGLIGENCE, 27; NUISANCES, 4.

LARCENY.

See CRIMINAL LAW, 8.

LIBEL AND SLANDER.

1. **THERE APPEARS TO BE NO AUTHORITY** supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. *Gilbert v. Crystal Fountain Lodge*, 255.
2. **MEMBER OF MUTUAL AID ASSOCIATION CANNOT MAINTAIN AN ACTION** against the association, sued as a partnership, for slanderous words spoken of and concerning him by the association while a member of it, and his remedy, if any, is against the wrong-doers individually. And it is immaterial in this respect that, in consequence of the slander, he was suspended from the benefits and privileges of the association for a term of years, and brought suit pending such term of suspension. *Id.*
3. **PUBLICATION OF. — COMMUNICATION FROM A HUSBAND TO HIS WIFE,** not in the presence of a third party, does not constitute a publication within the meaning of the law of slander. *Sesler v. Montgomery*, 76.
4. **EXAMINATION OF PLAINTIFF'S PERSON. —** A defendant is not entitled to an order requiring a plaintiff to submit to a physical examination of her person by medical experts, under a plea of justification, in an action by an unmarried female for slander, wherein it is alleged that the defendant had spoken of the plaintiff that she was a whore, had become pregnant, and had suffered an abortion to be produced upon her. *Kern v. Bridwell*, 409.
5. **PROOF OF LOSS OR DAMAGE NECESSARY TO MAINTAIN ACTION FOR. —** To sustain an action for libel, it must appear that the plaintiff has sus-

- tained some special loss or damage following as the necessary or natural and proximate consequence of the publication complained of, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication. *Stewart v. Minnesota Tribune Co.*, 696.
6. WORDS HELD NOT LIBELOUS. — To publish of a professional man that he has moved his office up to his house to save expense is not libelous. *Id.*
 7. LAW OF LIBEL CANNOT BE INVOKED TO REDRESS EVERY BREACH OF GOOD MORALS or of good manners in newspaper publications respecting individuals. *Id.*
 8. GOOD FAITH, WHAT CONSTITUTES IN CASE OF LIBEL. — Mere belief in the truth of a publication is not sufficient to constitute good faith on the part of the publisher; he must be free from negligence as well as from improper motives in making it. It is his duty to take all reasonable precautions to verify the truth of the statement, and to prevent untrue and injurious publications against others. Upon the evidence in this case, it was held that the question of good faith should have been submitted to the jury. *Allen v. Pioneer Press Co.*, 707.
 9. CORPORATION IS RESPONSIBLE IN DAMAGES FOR PUBLICATION OF LIBEL, which is shown to have been made by its authority, or to have been ratified by it, or to have been made by a servant or agent in the course of the business in which he was employed. *Fogg v. Boston etc. R. R. Co.*, 583.
 10. EVIDENCE TO CHARGE CORPORATION WITH PUBLICATION OF LIBEL. — Evidence should be submitted to the jury, in an action for libel against a railroad company, as showing that the company both authorized and ratified the publication, and that the publication was made by its servants or agents in the course of their employment, where it shows that a libelous extract from a newspaper, indicating that a neighboring ticket-broker was not a reliable person from whom to buy tickets, was kept posted forty days in a conspicuous place in an office of the defendant, arranged especially for the sale and advertising of railroad tickets, and in the immediate charge of an employee, and the general passenger agent, although notified, refused to interfere with such posting. *Id.*

See STATUTES, 5, 6.

LICENSE.

1. ONE GOING ON THE PREMISES OF ANOTHER WITHOUT INVITATION is a bare licensee of the latter, who passively acquiesces in his going, and cannot recover for injury sustained by reason of a mere defect in such premises. *Cusick v. Adams*, 772.
2. A MERE IMPLIED LICENSE, NO MATTER HOW LONG ENJOYED, to transact such business, for which no consideration has been paid, is revocable at any time, and such revocation results from notice not to prosecute the business in the future. *Fluker v. Georgia R. R. and Banking Co.*, 328.
3. ONE WHO PERSISTS IN USING THE LICENSE AFTER NOTICE OF ITS TERMINATION may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his expulsion from the premises. *Id.*
4. A LESSEE OR LICENSEE OF THE EXCLUSIVE PRIVILEGE OF ENTERING THE CARS or upon the right of way to sell or supply lunches is not a servant or agent of the corporation, so as to render it liable for an assault, or an

assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers. *Id.*

See FIXTURES; NUISANCES, 2.

LIENS.

See ATTORNEY AND CLIENT, 1, 2, 4; BANKS AND BANKING, 1, 3, 4; CARRIERS, 3; CONTRACTS, 5; CO-TENANCY, 1, 3; JUDICIAL SALES, 3; LANDLORD AND TENANT, 2; MECHANICS' LIENS; SALES, 12.

LIMITATION OF ACTIONS.

1. STATUTE OF LIMITATIONS DOES NOT COMMENCE RUNNING AGAINST AN ACTION ON AN OFFICIAL BOND until the close of the principal's term of office, though the conversion of which he is found guilty took place at a much earlier time. *People v. Van Ness*, 134.
2. WHERE AN ATTORNEY AT LAW AGREES TO RENDER SERVICES IN THE PROSECUTION OF AN ACTION, for which he is to be paid a specific sum when judgment is entered, a compromise obtained in favor of his client and the attorney is wrongfully discharged before the action is terminated. The statute of limitation does not commence to run against claim for compensation until judgment is recovered or a compromise made. *Bartlett v. Odd Fellows Sav. Bank*, 139.
3. IF LAND BELONGING TO A COUNTY, purchased and used by it for hospital purposes, is taken possession of by an intruder, his possession, however long continued, cannot create a prescriptive title in his favor. *County of Yolo v. Barney*, 152.

See CORPORATIONS, 10; MARRIED WOMEN, 2; MORTGAGES, 2, 3; TRUSTS AND TRUSTEES, 11.

LIQUOR LAWS.

See CRIMINAL LAW, 9, 10; EVIDENCE, 2.

MALICIOUS PROSECUTION.

1. WANT OF PROBABLE CAUSE — EVIDENCE OF PLAINTIFF'S GOOD REPUTATION. — Plaintiff may show his good reputation, known to the defendant when the prosecution was commenced, in an action for malicious prosecution upon a criminal charge, in order to prove that the prosecution was without probable cause. *McIntire v. Levering*, 594.
2. WANT OF PROBABLE CAUSE — EVIDENCE TO SHOW DISTRUST BY DEFENDANT OF PERSON ON WHOSE INFORMATION HE RELIED IN MAKING ARREST. — Declaration by defendant in action for malicious prosecution, prior to such prosecution, that he had heard that the person on whose information of the plaintiff's guilt he had relied in making the arrest, had been in jail, is admissible on behalf of the plaintiff, to show want of probable cause, in that such person was not a credible person. *Id.*
3. EVIDENCE — STATEMENTS MADE BY THIRD PERSONS IN ABSENCE OF PARTY. — Statements concerning the perpetration of the crime, made by third persons in the absence of the defendant, and not shown to have been communicated to him, to the justice before whom the defendant swore out the warrant for the plaintiff's arrest, are inadmissible on behalf of the defendant in an action for malicious prosecution. *Id.*

4. **MALICIOUS ATTACHMENT—REQUISITES OF COMPLAINT IN ACTION FOR.**—To sustain action for damages for malicious issuance of attachment brought against the plaintiff in the attachment suit, it must be alleged and shown that the writ was issued maliciously, and without probable cause. But a complaint in such action which alleges that the affidavit for the attachment was wholly false in every particular, and that the plaintiff in the attachment suit knew it to be so when he made it, is sufficient as against a general objection at the trial to the admission of any evidence under it. *Beyerendorf v. Sump*, 678.

MANDAMUS.

See **ELECTIONS**, 1, 2; **JUDGMENTS**, 5, 7; **TRIAL**, 2.

MARRIAGE AND DIVORCE.

1. **SINGLE ACT OF CRUELTY OR INDIGNITY, OR OF COARSE AND UNGALLANT CONDUCT** on the part of the husband, although such act amounts to a technical assault, does not constitute sufficient ground for a divorce at the suit of the wife. *Nye's Appeal*, 878.
2. **ENFORCEMENT OF DECREE DIRECTING PAYMENT OF ALIMONY.**—Where the husband fails to comply with a final decree in the wife's favor for alimony, such failure not arising from lack of means to comply, the court may compel compliance by an order of attachment directing his imprisonment until he obeys the decree. The enforcement of the decree by attachment for contempt is not equivalent to imprisonment for debt, and a violation of the constitution and laws of Georgia. *Lewis v. Lewis*, 281.
3. **DECREE OF DIVORCE DOES NOT RELATE BACK**, but takes effect only from the date of the judgment. *Alt v. Bankholder*, 681.
4. **DIVORCE PRESUMED IN FAVOR OF VALIDITY OF SECOND MARRIAGE.**—Where a woman contracts a second marriage while her first husband is alive, it will be presumed, in favor of the validity of the second marriage, that the first marriage was legally dissolved by a divorce before the second one was entered into, and one who asserts the invalidity of the second marriage must show that there had been no divorce. *Boulden v. McIntire*, 453.
5. **EVIDENCE INSUFFICIENT TO OVERCOME PRESUMPTION IN FAVOR OF MARRIAGE, WHAT IS.**—Where the grantee of a widow who has acquired land through a second marriage contracted by her sues to quiet title thereto as against the relatives of the second husband, who assert the invalidity of the marriage, a transcript showing that her first husband obtained a decree of divorce from her in the courts of another state, after the execution of the conveyance by her, does not, if admissible evidence at all, overcome the presumption that she had, prior to her second marriage, obtained a divorce. *Id.*

See **ESTOPPEL**, 7; **HOMESTEAD**, 1; **HUSBAND AND WIFE**, 5; **TRIAL**, 5; **TRUSTS AND TRUSTEES**, 1.

MARRIED WOMEN.

1. **COURT OF EQUITY ALONE HAS JURISDICTION OF SUBJECT-MATTER OF BILL FILED BY WIFE** to set up her equity in property coming to her from her father's estate, and which has not been reduced to possession by her. *Salter v. Salter*, 249.

2. **LIMITATION OF ACTION AGAINST MARRIED WOMEN.** — Under chapter 52, article 2, section 5, General Statutes of Kentucky, authorizing a wife abandoned by her husband to sue and be sued only after being empowered to do so by judgment of a court of equity, and under chapter 71, article 1, section 2, General Statutes of Kentucky, providing that if at the time the right of any person to bring an action for the recovery of real property first accrued such person was a married woman, she may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed; the three years' limitation commences to run from the date of the judgment, and not from the date of abandonment. *McDanell v. Landrum*, 500.
3. **ESTOPPEL — RIGHTS OF PURCHASER.** — Where a wife and her husband institute an action in which a judgment is rendered for the sale of her land to enable her to convey a good title, and after such sale to a *bona fide* purchaser the proceeds are invested in real estate in her name and for her benefit, she is estopped, after having acquiesced in the sale for twenty years, from dispossessing the purchaser, though the deed did not convey a perfect title except upon the equitable terms of restoring the *status quo*. *Id.*
4. **ESTOPPEL.** — A married woman cannot profit by her own fraud to the prejudice of a *bona fide* purchaser from her. Therefore, if she has received and invested the proceeds of a sale of her lands to him conveying an imperfect title, by purchasing other lands for her use and benefit, she is estopped from dispossessing him except upon refunding the purchase-money, and paying for such necessary improvements as may have been made in good faith. *Id.*

MASTER AND SERVANT.

1. **WRONGFUL DISCHARGE FROM SERVICE — DAMAGES RECOVERABLE.** — Where a servant has been discharged without sufficient excuse, before the expiration of his term of employment, *prima facie* he is entitled to recover to the extent of his wages for the whole term. He is bound, however, to use reasonable efforts to obtain employment elsewhere; but the burden of showing that he might by reasonable effort have found such employment elsewhere is upon the defendant. *Emery v. Steckel*, 857.
2. **A MASTER HAS NO RIGHT OF ACTION FOR AN ASSAULT,** or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom. *Fluker v. Georgia R. R. & Bkg. Co.*, 328.
3. **MASTER IS CIVILLY LIABLE FOR NEGLIGENCE OF HIS SERVANT** committed in the course of his employment, and resulting in injury to a third person, whether the act constituting the negligence is actionable on common-law principles, or is made such by statute. *Osborne v. McMasters*, 698.
4. **IF A DISORDERLY PASSENGER DEFILES THE CONDUCTOR,** draws a pistol, and thereby induces the conductor to arm in order to expel him from the train, and if after expulsion he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict, even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting. It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the

- master's interest and performing the servant's duty. *Penny v. Georgia R. R. & Bkg. Co.*, 334.
5. **EMPLOYEE ASSUMES RISK OF PERILS INCIDENT TO HIS EMPLOYMENT**, and cannot recover damages for an injury sustained from an accident which is an ordinary peril of the service undertaken by him. *Prather v. Richmond & D. R. R. Co.*, 263.
 6. **MASTER, AS GENERAL RULE, IS BOUND TO EXERCISE REASONABLE CARE IN PROVIDING SUITABLE MACHINERY**, instruments, means, and appliances for his work; and he is responsible if he fails to do so, and an injury results to his servant, although the negligence of a fellow-servant contributed to the accident. *Griffin v. Boston and Albany R. R. Co.*, 526.
 7. **SERVANT MUST SHOW THAT INJURY IS MORE NATURALLY TO BE ATTRIBUTED TO MASTER'S NEGLIGENCE** than to any other cause, in an action by him against the master to recover damages for an injury sustained by the master's failure to provide suitable machinery, instruments, means, and appliances. *Id.*
 8. **DUTY OF SERVANTS TO KNOW OF DANGERS AND DEFECTS**. — A servant has a right to rely upon a master's inquiry, because it is the master's duty to inquire, and the servant may justly assume that all things are fit and suitable for the use which he is directed to make of them. *Mages v. North P. C. R. R. Co.*, 69.
 9. **NOTICE TO SERVANT OF DEFECT**. — **RIGHT OF SERVANTS TO RECOVER ON ACCOUNT OF THE MASTER'S NEGLIGENCE IS NOT AFFECTED BY NOTICE OF ANY DEFECTS** other than such as the servants ought, in the exercise of ordinary prudence, to have foreseen might imperil their safety. Hence, there is no error in denying a nonsuit moved for on the ground that the plaintiff knew of the condition of the fences along the railroad track, from defects in which he was injured. A continuance of a servant in his work in the face of known danger only raises a question for the jury. *Id.*
 10. **ORDERING CHILD TO PERFORM SERVICE HE DID NOT UNDERTAKE TO PERFORM, EFFECT OF ON LIABILITY OF MASTER**. — Where a boy ten years old employed by a coal-mining company to do work within his capacity is, without instruction or caution, ordered by the person in charge of the workmen employed at the mine to leave his regular work and assist in switching and coupling cars, and does so, believing it to be his duty to obey, and while doing so is injured, the master is liable. *Brazil Block etc. Co. v. Gaffney*, 422.
 11. **MASTER IS LIABLE FOR INJURIES SUSTAINED BY BOY** who, without being instructed or cautioned, is ordered to perform a service the hazards of which, on account of his immature age, he is incapable of appreciating, although they are visible, or whose mind or strength is so immature that, though he has been instructed and cautioned, he is incapable of appreciating the instruction and warning or of safely performing the service required of him. *Id.*
 12. **FELLOW-SERVANTS — RAILROADS**. — Damages for personal injuries resulting from the collision of a passenger train with a freight train may be recovered by the engineer of the passenger train from the railroad company, upon proof that the injury was caused by the negligence of those in charge of the freight train, in not running the latter on time. *Kentucky Central R'y Co. v. Ackley*, 480.
 13. **A CORPORATION BUILDING A STRUCTURE** composed in part of brick-work and in part of wood-work is not responsible for the fall of the masonry upon the carpenter, whereby he was killed, if due care was exercised in

selecting the mason, and if there was no reason why he should not be fully trusted as an expert in his business, though his work proved defective and the carpenter thereby lost his life; the two workmen being co-employees of a common master and co-operating in their respective departments of labor to a common end, to wit, the erection and completion of the contemplated structure. *Keith v. Walker etc. Co.*, 296.

14. RAILROAD COMPANIES — FELLOW-SERVANTS, WHO ARE — NEGLIGENCE. — EMPLOYEE OF A RAILROAD COMPANY ENGAGED AS ONE OF A CREW UPON CONSTRUCTION TRAIN, whose business it is to do anything to insure the successful working of the train, is a co-employee with the balance of the crew, including the conductor or boss of the squad and the engineer and fireman of the engine, although at the time of an accident resulting in the death of such employee, the train was moving from one point to another, and the deceased had no active duty to perform; and if he immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, his widow cannot recover for his homicide in an action against the company. *Prather v. Richmond etc R. R. Co.*, 263.

See INFANTS, 1, 2; NEGLIGENCE, 3, 6; RAILROAD COMPANIES, 2, 3.

MECHANICS' LIENS.

FILING VERIFIED STATEMENT FOR RECORD OPERATES AS CREATION OF LIEN, and until this is done an action to enforce it cannot be maintained. *Meyer v. Berlandi*, 663.

See STATUTES, 12.

MINES AND MINING.

1. FAILURE TO DISTINCTLY MARK THE LOCATION OF A MINING CLAIM so that its boundaries can be readily traced invalidates the claim. *White v. Lee*, 115.
2. THE BOUNDARY OF A MINING CLAIM MUST BE DISTINCTLY MARKED AT THE TIME OF ITS LOCATION, although the claim is for a whole legal subdivision and the public surveys have been extended over the land. *Id.*

MISNOMER.

See PLEADING, 8.

MISTAKE.

EQUITY WILL NOT ASSIST ONE PERSON TO PROFIT BY THE MISTAKE OF ANOTHER. Hence, where a party by mistake bid for land at a foreclosure sale a less sum than was due thereon, and he, on discovering such mistake, increased his bid to the full amount due, which amount he paid, it was held that a court of equity would not compel such purchaser to accept a redemption based on the original sum, which he had thus mistakenly bid, but would grant relief only on the condition that the complainant pay the whole sum which was legally chargeable on his land. *Weyant v. Murphy*, 50.

See DEEDS, 8, 9; INSURANCE, 2, 6.

MORTGAGES.

1. TO CONSTITUTE "MORTGAGEE IN POSSESSION," he must be in possession by reason of the agreement or assent of the mortgagor or owner of the fee

that he have the possession under and because of the mortgage. The assent need not necessarily be express, but may be implied from circumstances. *Rogers v. Benton*, 613.

2. **MORTGAGEE IN POSSESSION — ACTION TO REDEEM, WHEN BARRED.** — The purchaser at a defective foreclosure sale, or his assign, who goes into possession of the mortgaged premises with the assent of the mortgagor, under the rights supposed to have been acquired under such sale, will be deemed a "mortgagee in possession." An action by the mortgagor to redeem must be brought within ten years from the date of the entry of the mortgagee into possession; otherwise, the right of action to redeem will be barred. *Id.*
 3. **EFFECT OF POSSESSION UNTIL RIGHT TO REDEEM IS BARRED.** — Where the holder of the mortgage has gone into possession as "mortgagee in possession," and so remains (the mortgage being unpaid) until the right of action to redeem is barred, he becomes vested with an absolute legal title to the mortgaged premises. *Id.*
 4. **MORTGAGEE IN POSSESSION — RIGHTS NOT AFFECTED BY TEMPORARY ABSENCE.** — Where possession is surrendered by mortgagor to mortgagee, and actual possession is taken by the latter, who, during ten years thereafter, has done nothing indicating an intention to abandon it, or to restore it to the mortgagor, and the mortgagor has not re-entered or asserted any right to do so, the mere fact that the mortgagee temporarily omitted to actually occupy the premises during a portion of the ten years will not affect his rights as "mortgagee in possession." Under such facts, the possession must be deemed to have continued all the time in him. *Id.*
 5. **MORTGAGEE'S ABORTIVE ATTEMPT TO FORECLOSE BY ADVERTISEMENT DOES NOT DESTROY LIEN OF MORTGAGE,** or cut off the right to resort to foreclosure by action. The two modes of foreclosure are cumulative. *Id.*
 6. **THOUGH ATTEMPTED FORECLOSURE BE ABORTIVE AND INEFFECTUAL, AS SUCH, IT MAY TAKE EFFECT AS TRANSFER** of the rights of the mortgagee to the purchaser at the sale, and to those who claim under him by conveyance of the interest in the premises apparently acquired by such purchaser at the foreclosure sale. *Id.*
 7. **ASSIGNMENTS TO BE PRODUCED ON REDEMPTION FROM FORECLOSURE, WHAT ARE NOT.** — Where a mortgagee transfers the note, without assigning the mortgage securing it, and afterwards buys back the note, the equitable transfers of the beneficial interest in the mortgage effected by the transfer and repurchase of the debt are not "assignments" within the meaning of General Statutes 1878, chapter 81, section 14, which the mortgagee is required to produce to the person or officer from whom he offers to redeem. *Wilson v. Hayes*, 754.
 8. **JUNIOR REDEMPTIONERS ONLY CAN TAKE ADVANTAGE OF NON-COMPLIANCE WITH PROVISIONS** of the statute, Laws 1881, extra session, chapter 3, requiring a redemptioner to file in the office of the register of deeds, within twenty-four hours after his tender and demand, the documents produced to the sheriff from whom the redemption is made. *Id.*
- See HOMESTEAD, 5; JUDICIAL SALE, 2; PUBLIC LANDS, 1; QUIETING TITLE

MUNICIPAL CORPORATIONS.

1. **IT IS IMPROPER AND ILLEGAL FOR ANY MEMBER OF CITY COUNCIL** to vote upon any question brought before the council in which he is personally interested. *Daly v. Georgia S. & F. R. R. Co.*, 286.

2. **LIABILITY OF CITY FOR NEGLIGENCE OF ITS OFFICERS IN PERFORMING CORPORATE DUTIES.** — A municipal corporation is liable for injuries to its employees or others, resulting from the negligence of its authorized agents in making improvements, which it has general authority under its charter to make, and which are authorized by it. *Welter v. City of St. Paul*, 752.
3. **MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR PERSONAL INJURIES TO INDIVIDUALS RESULTING FROM THE NEGLIGENCE** of its officers, as where they leave open a sewer, without proper guards or lights, on a dark night, into which plaintiff fell, to his great injury. *Chope v. City of Eureka*, 113.
4. **MUNICIPAL CORPORATION IS LIABLE IN DAMAGES FOR COLLECTING WATER IN ARTIFICIAL CHANNELS**, and casting it in a body upon the property of another; but it is not liable for consequential damages caused by the grading and improvement of its streets, unless the work is negligently performed. *Davis v. City of Crawfordsville*, 361.
5. **CITY IS LIABLE FOR REMOVING LATERAL SUPPORT OF LAND IN GRADING ITS STREETS.** It has no greater rights or powers over the soil of a street than a private owner has over his land; and if it desires greater powers than are possessed by private owners, it must acquire them by the exercise of the right of eminent domain. *Nichols v. City of Duluth*, 743.
6. **DEFECT IN HIGHWAY — HITCHING-POST.** — Hitching-post in highway, in or near the carriage-way, so as to make traveling thereon in carriages unsafe, is a defect for which a city is liable to one who, while so traveling, in the exercise of due care, is injured through the collision of his carriage with it. *Arey v. City of Newton*, 604.
7. **PERSONAL INJURIES — FIRING OF CANNON IN PUBLIC PARK.** — City of Boston is not liable for injuries sustained by a person by reason of his horse becoming frightened, while being driven upon an adjoining street, through the firing of cannon on the Common under a license granted in pursuance of an ordinance of the city. *Lincoln v. City of Boston*, 601.
8. **HIGHWAYS — USE OF STREET BY RAILROAD.** — The appropriation of a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. *Adams v. Chicago etc. R. R. Co.*, 644.
9. **GEORGIA ACT OF 1857** (Acts 1857, p. 182), conferring power upon municipal corporations to permit and sanction encroachments on their streets for a reasonable compensation in money to be paid into the city treasury, confers no authority upon the mayor and council of a city to grant to a railroad company, as an encroachment, a block of land eighty feet wide and four hundred and eighty feet long in one of the city streets. The meaning of the act is to allow the grant of small encroachments to property holders along the length of the streets and on both sides thereof, in order to narrow them. *Daly v. Georgia S. & F. R. R. Co.*, 286.
10. **GENERAL CLAUSE IN CHARTER OF CITY, GIVING IT POWER TO CONTROL ITS STREETS**, is not sufficient to authorize the corporate authorities to grant to a railroad company the privilege of laying its tracks along the streets of the city. *Id.*
11. **UNDER AUTHORITY GIVEN TO MUNICIPAL CORPORATIONS** by Georgia act of 1857 (Acts 1857, p. 182), "to permit and sanction encroachments for a fair and reasonable compensation in money paid into the city treasury," the mayor and council of a city have no power to make a donation of ten acres of land of the city commons to a railroad company, and after-

- wards grant to such company large encroachments upon a street of the city, the consideration therefor being the return of the ten acres of land to the city. *Id.*
12. **BOARD OF POLICE — REGULATION OF ITINERANT MUSICIANS.** — Board of police of the city of Boston have the power, under the statutes of the state and ordinances of the city, to adopt rules regulating and restraining itinerant musicians in the streets and public places of the city. *Commonwealth v. Plaisted*, 566.
 13. **REGULATION OF ITINERANT MUSICIANS — SALVATION ARMY.** — One who plays a musical instrument in the streets of a city, as a participant in a procession or parade of the Salvation Army, is an "itinerant musician" within the meaning of a rule of the board of police thereof requiring the taking out of a license by such persons. *Id.*
 14. **CONSTITUTIONAL LAW — REGULATION BY MUNICIPAL CORPORATION OF ITINERANT MUSICIANS — RELIGIOUS WORSHIP OF SALVATION ARMY.** — One who plays a musical instrument in the streets of a city, in violation of a rule of the board of police thereof, is not protected from the consequences of such violation by the fact that his act was done as a matter of religious worship only, as a participant in a procession or parade of the Salvation Army; and it is immaterial that there was no actual disturbance or breach of the peace on the particular occasion. *Id.*
 15. **NOTICE OF RULES OF BOARD OF POLICE UNNECESSARY.** — Rule of board of police regulating itinerant musicians is binding without notice. *Id.*
 16. **CONSTITUTIONAL LAW — DELEGATION BY LEGISLATURE OF POLICE POWER TO PARTICULAR BOARD OF OFFICERS OF CITY.** — Legislature may delegate the power to regulate the use of streets and public places to a board of police of the city. *Id.*
 17. **CONSTITUTIONAL LAW — SELF-GOVERNMENT — QUALIFICATIONS OF OFFICERS.** — Massachusetts statutes of 1885, chapter 323, creating a board of police for the city of Boston, whose members are to be appointed by the governor, with the advice and consent of the council, from the two principal political parties, is not unconstitutional because it takes from the city the power of self-government in matters of internal police, or because it fixes the qualifications of members of the board. *Id.*
 18. **POWER CONFERRED ON BOARD OF POLICE TO "REGULATE" INCLUDES POWER TO REQUIRE REASONABLE LICENSE FEE.** — Power conferred on board of police of a city to "regulate" itinerant musicians includes the power of requiring the taking out of a reasonable license fee. *Id.*
 19. **PART OF TERRITORY OF SCHOOL DISTRICT, WHICH IS ANNEXED TO CITY BY STATUTE,** becomes part of the city for school as well as for other municipal purposes, and ceases to be a part of the school district. *City of Winona v. School District*, 687.
 20. **CHANGE OF BOUNDARY OF MUNICIPAL CORPORATIONS, EFFECT OF ON THEIR PROPERTY RIGHTS.** — Where part of the territory of one municipal corporation is taken from it and annexed to another, the former corporation retains all its property, including that which happens to fall within the limits of such other corporation, unless some other provision is made by the act authorizing the separation. *Id.*

See NEGLIGENCE, 1, 11; RAILROAD COMPANIES, 2.

MURDER.

See DESCENT AND DISTRIBUTION, 4.

MUTUAL BENEFIT ASSOCIATIONS.

See **INSURANCE.**

NEGLIGENCE.

1. **IT IS NEGLIGENCE AS MATTER OF LAW** for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. The existence of an ordinance, however, is matter of fact to be referred to the jury; the court cannot notice it judicially. Such an ordinance, regulating speed of trains, and requiring flag-men and watchmen to be kept at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters. No unreasonable ordinance can be valid. *Western etc. R. R. Co. v. Young*, 320.
2. **CONTRIBUTORY NEGLIGENCE AS GROUND OF NONSUIT.** — The plaintiff was a passenger upon a cable-car, and got out on the north side of the car, and was in a place of entire safety between the tracks, where he could see the whole of them. Instead of looking westward, from which direction alone danger was to be apprehended, and without waiting for the car to move on, he turned sharply around the rear of the car, and started to cross the street, stepping upon the south track, and was struck and injured by another car going east. In such case the plaintiff was properly nonsuited upon the ground of contributory negligence. *Buzby v. Philadelphia T. Co.*, 919.
3. **NEGLIGENCE — FAILURE OF MASTER TO INSTRUCT MINOR SERVANT ABOUT MACHINERY — NEGLIGENCE OF MASTER WHEN QUESTION FOR JURY.** — In an action against a manufacturing company to recover damages for injuries sustained by a girl thirteen years old, because of the alleged failure to give proper instruction while attempting to clean a wheel of the spinning-frame on which she had been set to work, where she testified that she had never been told how to clean the wheel, but attempted to clean it as she had seen other operatives do; that to clean the wheel properly one spoke at a time was wiped, and to bring the spokes successively into position, it was necessary to give the wheel a partial revolution each time by means of a peculiar movement of the shipper above the frame, but that she had never been instructed how to give this motion; that she knew the wheel must be still in order to wipe it, and had never before attempted to clean it when the power was on; that after wiping one spoke she gave the wheel a motion, as she had observed the other girls do, supposing that it would partially revolve, and leave the next spoke in position, and that while in motion she attempted to pick off some waste, but the wheel went faster and farther than she expected, and her finger was caught between the spoke and the frame, — it was held that, although the plaintiff's testimony was directly contradicted, the jury having viewed the premises, the case was properly submitted to the jury, and a verdict in favor of the plaintiff would not be disturbed. *Glover v. Dwight Mfg. Co.*, 512.
4. **NEGLIGENCE IN ATTEMPTING TO GET ON HORSE-CAR IN MOTION, WHEN QUESTION FOR JURY.** — Questions whether plaintiff was negligent in attempting to get on a horse-car while in motion, and in seizing the rail of the rear dasher and trying to pull himself up to the car, after having lost his hold on the rail attached to the body of the car, are for the jury, where the evidence showed that the plaintiff, a man sixty-eight years

old, weighing nearly two hundred pounds, signaled to the driver to stop, and when the car had slowed up and was going at the rate of about four miles an hour, grasped the forward rail of the rear platform with his right hand and the rear rail on the dasher with his left, and made a spring to get on, but his foot struck on the edge of the step and slipped off, and the car starting up, he lost his grasp on the forward rail, after making several ineffectual attempts to get on the car, and holding to the dasher rail tried to keep up with the car, when he was thrown down and injured. *Briggs v. Union Street R'y Co.*, 518.

5. **FAILURE TO SIGNAL DRIVER TO STOP.** — It is not negligence, as a matter of law, to attempt to get on a horse-car going at the rate of about four miles an hour, even if it be known that the driver had not seen the signal to stop. *Id.*
6. **INJURY TO SERVANT — QUESTIONS OF NEGLIGENCE FOR JURY.** — Plaintiff is entitled to go to jury both on the question of the defendant's negligence and on the intestate's exercise of due care, where, in an action against a railroad company for causing the death of plaintiff's intestate, the plaintiff offered to prove that the intestate, in the discharge of his duties as a night watchman at one of the defendant's stations, while crossing the tracks at night when the station was filled with the noise and smoke of moving trains and the lights were in bad condition, after he had supposed a train had passed him, was run over and killed by the rear portion of the train which had become detached by reason of the spreading of a coupling-link, and was moving rapidly and silently, without signals, and with no one in charge. *Griffin v. Boston etc. R. R. Co.*, 526.
7. **NEGLIGENCE OF PARENT IMPUTED TO CHILD, WHEN QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE OF CHILD.** — Question whether mother of infant plaintiff exercised due care to prevent him from escaping from the house and going alone upon the highway, is properly left to the jury, who, if they find that he was on the highway without fault, might also find that he was not guilty of contributory negligence, where, in an action to recover damages for injuries sustained by the plaintiff, a boy between four and five years of age, from a kick of the defendant's horse, there was evidence that the plaintiff was under the care of his mother, and that while she was nursing a baby, he walked into another room, and after he had been absent a minute or two, she ran to the door and saw him returning from the highway covered with blood. *Marsland v. Murray*, 520.
8. **FACT OF PERSON'S VOLUNTARILY ALIGHTING FROM MOVING TRAIN IS NOT CONCLUSIVE PRESUMPTION OF NEGLIGENCE** on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting are to be taken into consideration in determining whether or not he was guilty of negligence in leaving, or attempting to leave, the train. *Louisville etc. R. R. Co. v. Crunk*, 443.
9. **CONTRIBUTORY, ON PART OF CHILD.** — A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence. *Twiss v. Winona etc. R. R. Co.*, 626.

10. **CONTRIBUTORY CONDUCT ON PART OF CHILD AMOUNTING TO.** — A boy nearly ten and one half years old, of average intelligence, had frequently been in the vicinity of a railroad turn-table, and was familiar, in a general way, with its structure and operation. His father had frequently warned him against going on the turn-table, and told him of the danger, and the boy himself knew that it was dangerous, and that playing on it was forbidden by the railroad company; nevertheless, he engaged with other boys in swinging upon it while it was in motion, and was injured by his foot being caught between the arms of the table and the stationary abutments. In such case, the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to fully understand or appreciate the extent of the danger to which he subjected himself. *Id.*
11. **MUNICIPAL CORPORATIONS — DEFECT IN HIGHWAY — CONTRIBUTORY NEGLIGENCE.** — City is not liable for injuries sustained by a person traveling in a carriage in the night-time upon a narrow highway, the width of which was known to the driver, through the collision of his carriage with a hitching-post standing between the traveled part of the sidewalk and the carriage-way, while the driver, who was unable to distinguish the line of the sidewalk, was driving upon the sidewalk in violation of an ordinance of the city, in an attempt to pass another carriage going in the same direction. *Arcy v. City of Newton*, 604.
12. **MOTION TO MAKE COMPLAINT MORE SPECIFIC, PROPERLY DENIED WHEN.** — Where a complaint in an action against a railroad company to recover damages for personal injuries sustained by the plaintiff alleges that the injuries were caused by the defendant's suddenly and greatly accelerating the speed of its train while the plaintiff was in the act of stepping off at a depot, it is not error to overrule a motion to make the complaint more specific by stating what agent or employee of the defendant caused the motion of the train to be suddenly and greatly accelerated, and what acts of such agent caused the motion to be suddenly and greatly accelerated, and by showing how or in what respect such acts of said agent were negligent and wrongful. *Louisville and Nashville R. R. Co. v. Crunk*, 443.
13. **NEGLIGENT AND UNAUTHORIZED USE OF ELEVATOR, AS DEFEATING ACTION FOR INJURIES SUSTAINED BY FALLING DOWN UNGUARDED ELEVATOR-WELL.** — Verdict for defendants is properly ordered in an action brought by a boy to recover damages for injuries sustained by him by falling down an unguarded elevator-well, where the plaintiff, in going to rooms in the upper story of a building, made use of a freight elevator, plainly not designed for passengers, and which he had repeatedly used before, without invitation and contrary to orders, and on reaching the rooms he stepped off the elevator, closing the door leading from the well, and on finishing his errand, went back to the door in a great hurry, opened it, and, without looking, stepped into the well, and fell, the elevator having in the mean time been lowered, as he knew it might be, by simply pulling a rope below. *Patterson v. Hemenway*, 523.
14. **DUE AND ORDINARY CARE MUST BE EXERCISED IN CROSSING PUBLIC STREETS,** as in all the other transactions of life. Even on the sidewalk, specially devoted to the use of foot-passengers, a person is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where he is bound to take notice of

- such other rights, and to use his own with due regard thereto. *Bundy v. Philadelphia Traction Co.*, 919.
15. **DUE CARE FOR ITS OWN SAFETY IN A CHILD NINE YEARS OF AGE** is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation. Neither the average child of its own age, nor the prudent man, is a standard by which to measure its diligence with legal exactness. Such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires. *Western etc. R. R. Co. v. Young*, 320.
 16. **LIABILITY FOR NEGLIGENCE OF DUTY IMPOSED BY STATUTE OR ORDINANCE**. — One who neglects to perform a specific duty imposed upon him by a statute or municipal ordinance, for the protection or benefit of others, is liable to those, for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect. *Osborne v. McMasters*, 698.
 17. **NEGLIGENCE IS BREACH OF LEGAL DUTY**, whether the duty is one that is imposed by the rule of the common law requiring the exercise of ordinary care not to injure another, or one that is imposed by a statute designed for the protection of others. *Id.*
 18. **JOINT TORT-FEASORS — LIABILITY OF ONE THROUGH WHOSE NEGLIGENCE INJURY WAS CAUSED, TO INDEMNIFY ANOTHER WHO HAS BEEN COMPELLED TO ANSWER THEREFOR**. — Railroad company against which a judgment has been recovered by one who sustained personal injuries through the obstruction of a sidewalk at its station by mail-bags, is not a joint wrong-doer with mail-carriers who negligently caused the obstruction, in such a sense as to prevent a recovery by it from such carriers of the amount of the judgment paid. *Old Colony R. R. v. Slavens*, 558.
 19. **ONE CONSTRUCTING A BRIDGE FOR HIS OWN CONVENIENCES OR PURPOSES, CONNECTING HIS LAND WITH A HIGHWAY, THEREBY ASSUMES** no active duty of vigilance to see that those who go upon it voluntarily, and by no invitation of his, are not injured, though by his sufferance the public has made use of such bridge. *Cusick v. Adams*, 772.
 20. **LIABILITY OF OWNER OR OCCUPIER OF PREMISES TO PERSONS THEREON BY INVITATION**. — When the owner or occupier of land, expressly or by implication, invites others to come upon his premises for any lawful purpose, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit, and he is liable in damages to persons, so invited, for injuries sustained by reason of the unsafe condition of the land or its approaches. *Atlanta Cotton-seed Oil Mills v. Coffey*, 244.
 21. **DANGEROUS PREMISES. — KEEPING AND USING DANGEROUS CHEMICAL ON ONE'S PREMISES**, and knowing it to be dangerous, is analogous to having a dangerous animal confined on the premises; and if such chemical escapes and mingles with the soil, whereby a person lawfully upon the premises by invitation, express or implied, is injured, the burden rests upon the proprietor to show that he exercised ordinary care to prevent the chemical from escaping. *Id.*
 22. **DANGEROUS PREMISES — FACTS FROM WHICH NEGLIGENCE MAY BE INFERRED**. — In an action to recover damages for the loss of the plaintiff's horse, caused by the alleged negligence of the defendant, it was shown that the horse stepped into a mud-hole within a few feet of the defendant's cotton-seed oil mills, on a private way over the defend-

ant's land, where the plaintiff lawfully was; that immediately afterward the horse showed signs of pain, and upon examination something like a scald or burn was discovered above the hoofs of two of his feet; it was further shown that caustic soda was used in the mill for refining oil, and that when dissolved in water it would burn animal flesh. The horse's hoofs and ankles were severely burned, from the effects of which he died. There was no evidence tending to show how the caustic soda escaped from the mill-house into the mud. In such case, the jury were authorized to infer negligence on the part of the defendant in allowing the dangerous substance to get from the mill to where it was. *Id.*

23. **FALL OF SNOW FROM ROOF OF BUILDING OF NO UNUSUAL CONSTRUCTION.** — One who constructs a building so near the street that ice or snow will so fall from it, in the ordinary course of things, as to endanger travelers therein, is liable for injuries thereby caused, although the building is of no unusual construction. *Smethurst v. Proprietors of etc. Cong. Church*, 550.
24. **FALL OF SNOW FROM ROOF PROJECTING OVER INTO STREET.** — One who constructs a building with eaves projecting over into the street, so as to endanger travelers therein by ice or snow falling from the roof, is liable in an action for negligence for injuries thereby caused, although the construction of the building was also distinctly wrongful. *Id.*
25. **FALL OF SNOW FROM ROOF — PROXIMATE CAUSE.** — Negligence of defendant is the proximate cause of the injuries to the plaintiff, where through such negligence snow falls from the roof of defendant's building striking plaintiff's horse, causing it to start, and throwing plaintiff from the wagon to which the horse was attached. *Id.*
26. **LIABILITY OF OWNER FOR INJURY FROM SNOW FALLING FROM NEGLIGENCELY CONSTRUCTED ROOF.** — The owner of a lot fronting on a city street, who erects thereon a building with a roof so constructed that ice and snow collecting on it naturally falls upon the sidewalk, and injures a person traveling on such sidewalk with due care, is liable, without other proof of negligence, for the injury. And it is no defense in such case that he exercised all the care he could to remove the snow and ice from the roof. The gist of the negligence consists, not in the management of the roof, but in its improper and unsafe construction. *Hansen v. Pence*, 717.
27. **LIABILITY FOR NEGLIGENCE IN ERECTING AND MAINTAINING ROOF OF UNSAFE CONSTRUCTION CANNOT BE EVADED** by turning over possession of the building to a tenant; and in an action to recover damages for such negligence, it is therefore immaterial whether the actual possession of the building was in the defendant or in his tenants. *Id.*
28. **ACTION FOR CAUSING DEATH — WHO MAY SUE.** — The right of action for wrongfully or negligently causing the death of a person is purely statutory, and the action can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted. *Usher v. West Jersey R. R. Co.*, 863.
29. **BY NEW JERSEY STATUTE, ACT OF MARCH 3, 1848, P. L. 151, RIGHT OF ACTION FOR NEGLIGENT DEATH** is created for "the exclusive benefit of the widow and next of kin," but "every such action shall be brought by and in the names of the personal representatives of such deceased person." Under the provisions of this statute, a widow has no authority to bring suit in her own name in the courts of Pennsylvania upon a cause of action arising in New Jersey. *Id.*

80. **PENNSYLVANIA STATUTE, ACT OF APRIL 26, 1855, P. L. 309, GIVING RIGHT OF ACTION FOR NEGLIGENTLY CAUSING DEATH** to the widow, if there be one, of the deceased, has no extraterritorial force enabling her to sue in the courts of Pennsylvania for the death of her husband caused by negligence in a foreign state. *Id.*
81. **PLEADING. — PLAINTIFF SUING FOR INJURIES WHICH HE CLAIMS TO HAVE SUFFERED FROM THE NEGLIGENCE** of the defendant need not make any independent or explicit allegation that he himself was without fault. Therefore, in an action by a brakeman to recover of a railroad company for injuries occasioned to him by reason of the company's negligence in maintaining an insufficient fence adjoining its track, and in not keeping a cow-catcher in a proper position, he need not allege that he was ignorant of the defects in the fence, nor of the improper position of the cow-catcher. *Mages v. North P. C. R. Co.*, 69.
82. **EVIDENCE. — IN AN ACTION BY A BRAKEMAN TO RECOVER COMPENSATION FOR INJURIES RESULTING FROM NEGLIGENCE** in not maintaining a proper fence along the right of way of a railway company, evidence tending to show that the plaintiff was ignorant of the defects in the fence at the time he was injured is admissible and relevant, although his complaint does not allege such ignorance. *Id.*
83. **CIRCUMSTANTIAL EVIDENCE OF PERSONAL INJURY — VERDICT WHEN WARRANTED BY EVIDENCE.** — Jury is warranted in finding that injury was caused by a kick of the defendant's horse, where, in an action to recover damages for injuries alleged to have been sustained by the plaintiff, a boy between four and five years of age, from a kick of the defendant's horse, the evidence showed that the horse was unharnessed and unattended on the highway near the house of the plaintiff's father, that screams were heard, and the plaintiff was first seen lying back of the horse's heels and afterwards near the horse, and that the wound was such as might have been caused by the kick of a horse. *Marsland v. Murray*, 520.
- See **BANKS AND BANKING**, 7-10; **CARRIERS**, 15; **COUNTIES**, 1, 2; **DAMAGES**, 7, 8; **ESTOPPEL**, 6, 7; **GUARDIAN AND WARD**, 1, 2; **LICENSE**, 1; **MASTER AND SERVANT**, 3-6, 13, 14; **MUNICIPAL CORPORATIONS**, 2-6; **RAILROAD COMPANIES**, 2-5.

NEGOTIABLE INSTRUMENTS.

1. **ACCOMMODATION NOTE HAS NO VALIDITY UNTIL IT IS DISCOUNTED** or passes into the hands of a holder for value, and until it is negotiated the maker can withdraw from and rescind his engagement upon it. *Second National Bank v. Howe*, 744.
2. **LIABILITY OF INDORSER. — COMMERCIAL PAPER, TO BE NEGOTIABLE**, must be certain, unconditional, and not contingent. And a promissory note having on its face a written memorandum as follows: "This note is given for advancements, and it is the understanding it will be renewed at maturity," — is thereby deprived of the essential qualities of commercial paper, and an indorser of the note is relieved from liability upon his contract of indorsement. *Citizens' National Bank v. Piollet*, 860.
3. **FRAUDULENT ALTERATION OF INSTRUMENT BY HOLDER INCAPABLE OF RATIFICATION.** — Where the holder of a promissory note makes a fraudulent alteration in it, amounting in law to a forgery, which destroys the instrument and extinguishes the debt, the maker's subsequent assent to such

alteration, given without any new consideration, does not create any liability upon the altered instrument in favor of the holder. *Wilson v. Hayes*, 754.

4. RESIDENCE OF INDORSER OF NEGOTIABLE PAPER AT WHICH NOTICE OF DISHONOR MAY BE GIVEN is not necessarily a permanent, exclusive, or actual abode, but may be a temporary, partial, or even constructive residence. *Wachusett National Bank v. Fairbrother*, 530.

5. NOTICE OF NON-PAYMENT OF PROMISSORY NOTE — RESIDENCE OF INDORSER FOR PURPOSE OF MAILING NOTICE. — Notice of non-payment of promissory note is properly sent to indorser, as at her best place of residence, under the following circumstances: The indorser, after having lived abroad, returned with her husband to her mother's house in F., her early home, where they remained for several months, during which time the note was indorsed. She and her husband then left F. for the purpose of going to his home in England, with no intention of returning, and proceeded to the seashore for their child's health before sailing, leaving behind part of their baggage, ready to be sent to the steamship. The child died at the seashore several weeks afterwards, on a Sunday, and they returned to F. on the next day to bury it. The funeral took place from the mother's house on the following Wednesday, the party in the mean time sleeping there, and taking their meals at the house of a notary next door, when, with the notary's knowledge, they went to the house of another friend, where they stayed until Friday. The note matured on Wednesday, on which day the notary protested it for non-payment, and on the next morning he sent by mail a notice thereof, directed to the indorser at her mother's house in F., at which place she received it while there on Friday for a temporary purpose, prior to returning to the seashore. *Id.*

See ALTERATION OF INSTRUMENTS; BANKS AND BANKING, 13; CORPORATIONS, 4, 6; PLEADING, 8; USURY.

NEW TRIAL.

1. REJECTION OF SOME ADMISSIBLE EVIDENCE is not necessarily ground for a new trial. *Van Winkle v. Wilkins*, 299.
2. ALL GROUNDS OF MOTION FOR NEW TRIAL MUST BE INCLUDED IN ONE MOTION; parties filing a motion for a new trial cannot separate the grounds, and file a separate motion for each cause assigned. *Moon v. Jennings*, 383.

NEW TRIAL.

See APPEAL AND ERROR, 4, 5, 8.

NOTARY PUBLIC.

See ACKNOWLEDGMENTS.

NUISANCES.

1. WHO LIABLE FOR. — IT IS THE OCCUPIER OF LANDS, rather than the owner thereof, who is generally answerable for any nuisance thereon. The owner, however, is responsible if he creates and maintains a nuisance; if he creates a nuisance, and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was created by the prior owner, or by a stranger, and he knowingly maintains

it; if he demises the premises, and covenants to keep them in repair, and omits to repair them, and thus they become a nuisance; and if he demises premises to be used as a nuisance or for a business, or in a way so that they will necessarily become a nuisance. *Ahern v. Steele*, 778.

2. GRANTEE OR DEVISEE OF PREMISES UPON WHICH THERE IS A NUISANCE is not responsible therefor until he has notice thereof, and in some cases not until he has been required to abate the same. Notice may be inferred in some instances, as where the grantee or devisee comes into the possession of the premises, and their condition is such that their possessors must know that they constitute a dangerous nuisance. *Id.*
3. CHILDREN WHO INHERIT PROPERTY SUBJECT TO AN OUTSTANDING LEASE ARE NOT RESPONSIBLE FOR A NUISANCE CREATED THEREON during the existence of the precedent estate, and without any notice thereof. *Id.*
4. THAT OWNERS OF LEASED PROPERTY HAD THE RIGHT TO GO THEREON TO MAKE REPAIRS, if they should see fit to do so, does not render them liable for a nuisance thereon by which plaintiff was injured. The rule would be otherwise if they had agreed to make all necessary repairs. *Id.*
5. MAINTENANCE OF GROWING TREES UPON A BOUNDARY LINE between plaintiff's and defendant's land cannot be enjoined as a nuisance; where the only damage shown to have resulted to plaintiff from such trees were: 1. That they might have interfered with the growing of fruit-trees had any been planted; 2. That they crowded over the fences on plaintiff's land at a place where it was the duty of defendant to repair them. *Grandona v. Lovdal*, 121.
6. ABATEMENT OF — RESPONSIBILITY ASSUMED. — PERSON WHO UNDERTAKES TO ABATE NUISANCE PROCEEDS AT HIS PERIL, and takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment, he is answerable in damages; and if a breach of the peace is involved, he is liable to indictment for the result. *Crosland v. Pottsville Borough*, 891.
7. TO WHAT EXTENT RIGHT TO ABATE MAY BE EXERCISED. — When a person who is entitled to a limited right exercises it in excess so as to produce a nuisance, it may be abated to the extent of the excess. But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be stopped entirely, until means have been taken to reduce it within its proper limits. *Id.*
8. RIGHT OF LOT-OWNER IN BOROUGH TO ABATE NUISANCE ARISING FROM UNLAWFUL MAINTENANCE OF SEWER DRAIN THROUGH HIS PREMISES. — The plaintiff, owning a lot in a borough, gave to a lot-owner across the street a license to conduct the surface-water from his premises through a drain, passing under the street and through the plaintiff's lot to a certain stream. The licensee abused the privilege granted by using the drain as a channel for noxious and offensive matter instead of surface-water, thereby creating a nuisance to the injury of the plaintiff's dwelling-houses; whereupon the plaintiff disconnected the drain, and stopped it at his curb-line. The offensive matter then overflowed into and upon the street, when the borough authorities, at the instance of the licensee, opened up the drain, and reconnected it with the plaintiff's premises. The plaintiff was present, and resisted the workmen, and was arrested by the police, and imprisoned in the lockup. In such case, the plaintiff had a right, after due notice, and creating no breach of the peace, to abate this nuisance. The borough authorities

had no right to reconstruct the drain so as to again throw its contents upon the plaintiff's premises, and their attempt to do so was wholly without authority; and in an action by the plaintiff against the borough to recover damages for the injury and for his arrest, it was error to submit the case to the jury with binding instructions to find for the defendant. *Id.*

See CRIMINAL LAW, 5; FENCES, 2, 3; HUSBAND AND WIFE, 8; LANDLORD AND TENANT, 1; TRUSTS AND TRUSTEES, 10.

OFFICE AND OFFICERS.

1. OFFICIAL BOND IS NOT REGARDED AS DELIVERED PRIOR TO ITS APPROVAL by the proper officer, and it has no operation until delivered. *People v. Van Ness*, 134.
2. OFFICIAL BOND OF COUNTY TREASURER FOR SECOND TERM IS NOT AVOIDED by the fact that the board of county commissioners knew when they accepted the bond that the officer had converted funds during the prior term. *County of Pine v. Willard*, 622.
3. MONEYS COLLECTED UNDER COLOR OF OFFICE WITHOUT AUTHORITY OF LAW MUST BE ACCOUNTED FOR and paid to the state in whose name and by whose authority they were pretended to have been collected. *People v. Van Ness*, 134.
4. EVIDENCE OF CONVERSION BY PUBLIC OFFICER. — If a public officer on being officially required to return a statement of his accounts replies that he has no property or moneys of the state in his possession, and has had none during his term of office, and it is shown that in fact he has received sundry sums for which he ought to have accounted, the court is justified in finding that these several sums were converted as fast as received. *Id.*
5. A PAPER IS FILED WHEN it is delivered to the proper officer and by him received to be kept on file; and the file-marks are but evidence of its having been filed. The duty of filing usually includes that of putting on such marks. *County Commissioners v. State*, 183.

See INJUNCTIONS, 2, 3; LIMITATION OF ACTIONS, 1; SURETYSHIP, 1-3

PARENT AND CHILD.

WHEN BILL IN EQUITY IS FILED BY WIFE TO SET UP HER EQUITY IN PROPERTY, the rights of her children attach immediately, and the court will make a provision for them, except where the wife dissents or objects thereto. It is not necessary that the children should be made parties to the bill. *Salter v. Salter*, 249.

See CRIMINAL LAW, 10; GUARDIAN AND WARD, 3; INSURANCE, 14; NEGLIGENCE, 7.

PAROL EVIDENCE.

See DEEDS, 7, 8; INSURANCE, 4, 12; VENDOR AND VENDEE, 1.

PARTNERSHIP.

1. CONTRACT FOR SALE OF LAND TO PARTNERSHIP IN FIRM NAME IS ENFORCEABLE in equity, and the deed will be decreed to be executed to the individual partners as tenants in common. *Townshend v. Goodfellows*, 736.

2. **POWER OF PARTNER TO BIND FIRM BY CONTRACT.** — A partner, being competent to bind his firm by contract touching its business, is also competent to make time of the essence of such contract without special delegation of power to him by his copartners. *Van Winkle v. Wilkins*, 299.
3. **EXECUTORS OF DECEASED PARTNER — SALE BY EXECUTORS OF PARTNERSHIP ASSETS TO SURVIVING PARTNER, WHO WAS ALSO EXECUTOR — LACHES IN AVOIDING SALE.** — Executors of deceased partner have no authority to make a final agreement with the surviving partner as to the price and terms at which he might take the decedent's interest in the partnership assets, where the surviving partner was one of the executors, under a partnership agreement which provided that, in the event of either partner dying, the survivor should have the option of taking the assets himself at such price and terms as might be agreed upon with the representatives of the deceased partner; and their agreement as to the value may be avoided by those interested in the estate within a reasonable time. *Denholm v. McKay*, 574.
4. **EXECUTOR'S LIABILITY ON IMPROPER SALE OF PARTNERSHIP ASSETS.** — Executors of deceased partner who sell his interest in the partnership assets to the surviving partner, who was one of the executors, believing that they had the right to do so under the partnership agreement, and have accounted for a price which they thought was reasonable, but which was, in fact, somewhat below the real value, and where the surviving partner formed, with new partners, another firm, which purchased such assets, mingled them with new assets, and sold them, will be held to account, under the circumstances, simply for the full value of the interest of the decedent at the time of the sale, with interest, instead of the amount actually accounted for. *Id.*

See LIBEL AND SLANDER, 1, 2; PLEADING, 3.

PATENT.

See PUBLIC LANDS, 2, 3.

PLEADING.

1. **THE AMENDED COMPLAINT TAKES THE PLACE OF THE ORIGINAL,** and is therefore the proper pleading to deposit in the post-office where the service of process is made by publication. *Mudge v. Steinhart*, 17.
2. **SUPPLEMENTAL COMPLAINT.** — If original complaint fails to state cause of action, it cannot be sustained by filing a supplemental one founded on matters which have subsequently occurred. A supplemental complaint can only enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing when the suit was commenced. *Meyer v. Berlandi*, 663.
3. **OBJECTION TO COMPLAINT, WHEN MUST BE MADE BY MOTION TO MAKE MORE SPECIFIC.** — Where a complaint alleges that the plaintiff was compelled to perform the act which resulted in the injury to him, an objection that the facts constituting the compulsion are not stated cannot be reached by demurrer, but must be made by a motion to make the complaint more specific. *Brazil Block etc. Co. v. Gaffney*, 422.
4. **GENERAL DENIAL IS ALWAYS QUALIFIED OR LIMITED BY ANY ADMISSION** or inconsistent allegation in the pleading. *Hannen v. Pence*, 717.
5. **ANSWER WHICH ALLEGES** that defendant "has no information or belief sufficient to enable him to answer the allegation set forth in

paragraph 3 of said complaint, and for that reason he denies each and every and all of said allegations in said paragraph contained," is sufficient to put in issue an allegation in such paragraph that the cause of action sued upon had been assigned to the plaintiff. *Reed v. Bufum*, 131.

6. **ORDER OVERRULING DEMURRER—DISCRETION OF COURT.**—Where, in overruling a demurrer to a complaint, the court allowed the defendant to answer within ten days, upon the condition that the cause should proceed to trial at a term of court then being held, the imposition of this condition was not an abuse of discretion. *Flaherty v. Minneapolis etc. R'y Co.*, 654.

7. **IN ALLOWING PARTY TO WITHDRAW DEMURRER AND TO PLEAD TO FACTS ALLEGED AGAINST HIM,** a court may, in the exercise of its discretion, properly impose such reasonable conditions as may prevent unnecessary delay in the trial and determination of the cause; and it must be made to appear that a party has been prejudiced, before the action of the court in such matters, not appearing to be unreasonable or prejudicial upon its face, will be held to have been an abuse of discretion. *Id.*

8. **A MISNOMER IN THE NAME OF A PARTNERSHIP CREDITOR** (such as J. P. Sarrazin & Son for J. P. Sarrizin's Son & Co., or M. C. Kiser & Co. for M. C. and J. F. Kiser & Co.) in the list of creditors furnished to the ordinary, and in addressing notice to the partnership, will not vitiate the exemption proceedings or render them ineffective against such partnership. *Gamble v. Central R. R. & B. Co.*, 276.

See APPEAL AND ERROR, 9; CORPORATIONS, 15; FRAUD, 10-12; HUSBAND AND WIFE, 2; INSURANCE, 10, 11; MALICIOUS PROSECUTION, 4; NEGLIGENCE, 31, 32; STATUTE OF FRAUDS, 1, 2.

PROCESS.

1. **PROOF OF SERVICE OF SUMMONS IN RECORD, EFFECT OF.**—Where, in an action against a non-resident defendant, who was shown to have been personally beyond the jurisdiction of the court, the record states the manner in which the summons against him was served (by publication), it will not be presumed that other proof of service was made to the court than that thus shown in the record and recited in the judgment, nor that the court acquired jurisdiction, unless that is affirmatively shown. *Godfrey v. Valentine*, 657.

2. **SERVICE BY PUBLICATION—INSUFFICIENT PROOF OF.**—Proof of the publication of the summons for "six successive weeks" is insufficient to show a publication "once in each week" for the period named. *Id.*

3. **SERVICE OF SUMMONS BY PUBLICATION.**—Deposit of summons and complaint in the post-office at the place where the attorney for plaintiff resides and has his office, instead of in the post-office where the order of publication was made, is not improper. *Mudge v. Steinhart*, 17.

PUBLIC LANDS.

1. **VALID MORTGAGE MAY BE GIVEN BY ONE WHO HAS MADE ENTRY UNDER HOMESTEAD LAWS** of the United States, upon the land so entered, before he has made his final proof and received the certificate thereof. *Lang v. Morey*, 748.

2. **IF A PATENT IS TO BE ISSUED TO PUBLIC LANDS UPON THE ASCERTAINMENT OF CERTAIN FACTS** by the proper officers of the land department

of the general government having jurisdiction to inquire into and to determine those facts, then the issuance of a patent is a final declaration that such facts have been found in favor of the patentee, and is conclusive in a court of law, and cannot be collaterally attacked. *Gale v. Best*, 44.

2. **PATENT WHEN CONCLUSIVE THAT LAND IS NOT MINERAL.** — Where a patent issues for public lands under a law which provides for their disposal as agricultural lands, — either to a railroad corporation or to pre-emption or homestead claimants, — and there is no reservation in the law, except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural, and afterwards, in a court of law, it is not competent to reopen the question of the character of the land. *Id.*

QUIETING TITLE.

- ACTION TO QUIET OR DETERMINE CONFLICTING CLAIMS OF TITLE** may be maintained against one who claims to have a mortgage on the premises. *Withers v. Jacks*, 143.

See CO-TENANCY, 2.

QUITCLAIM DEED.

See DEEDS, 11.

RAILROAD COMPANIES.

1. **LIABILITY OF RAILROAD COMPANY FOR INJURY CAUSED BY SUDDEN INCREASE OF SPEED.** — If a person rightfully enters a railway train at a station to assist in carrying a sick passenger to a seat in the car, and the train is started before he has had a reasonable time to get off, at a rate of speed so slow as to enable him to alight in safety, but while he is about to step from the platform the speed of the train is suddenly and greatly increased through the negligence of the persons in charge of the train, and he is thrown off and injured, the company is liable. *Louisville etc. R. R. Co. v. Crunk*, 443.
2. **NEGLIGENCE — BURDEN OF PROOF.** — EMPLOYEE CANNOT RECOVER FROM RAILROAD COMPANY unless he be free from fault, and if he is killed while in disobedience of a rule of the company, or an order of the conductor given while he is under the command of that officer, his widow cannot recover for his homicide unless it clearly appears that such disobedience did not, directly or indirectly, contribute in any degree to the injury. The burden to show this rests upon the plaintiff. *Prather v. Richmond etc. R. R. Co.*, 263.
3. **EMPLOYEE OF RAILROAD COMPANY IS BOUND TO OBEY ALL REASONABLE RULES** and regulations of the company, and all reasonable orders of the person who is in command of the squad of whom the employee is one, given either for the protection of the interests of the company or of the employee himself, and if he disobeys these rules or orders, the burden is upon the plaintiff to show that the disobedience did not contribute to the injury. And if it is shown that the employee has disobeyed the orders of his superior, the burden is upon him to show that such disobedience did not contribute in any degree to the injury. *Id.*
4. **FIRE CAUSED BY SPARKS FROM ENGINE — EVIDENCE.** — Evidence showing that a fire started in an open field near a railroad track, immediately

after the passing of a locomotive and train, and that a strong wind was blowing from the south, and the fire started north of the track, that no persons were in the vicinity, and that there was no apparent cause of the fire except the passing train, justifies the conclusion that the fire was caused by the engine. *Dean v. Chicago etc. R'y Co.*, 659.

5. **FIRE CAUSED BY ENGINE — PRESUMPTION OF NEGLIGENCE.** — In an action against a railroad company to recover for injury from fire caused by the defendant's engine, testimony from a qualified expert witness, presented as such on the part of the defendant, that, with the appliances in use to prevent the escape of fire, the fire could not have been so caused, unless the engine had been out of repair, should be considered in connection with the statutory presumption of negligence, sufficient to justify a verdict against the defendant, although other evidence tended to exculpate the defendant. *Id.*
6. **THE DOMINION OF A RAILROAD CORPORATION OVER ITS TRAINS, TRACKS, AND "RIGHT OF WAY"** is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases when they come to transact their own private business with passengers or other third persons, and admit whom it pleases when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches. *Fluker v. Georgia R. R. and Banking Co.*, 328.
7. **FROM WHAT TIME POSSESSION DATES UNDER GRANT OF RIGHT OF WAY.** — Possession by a railroad company and its successors, under a grant which contemplates the construction and operation of a railroad, dates from the time construction commences, and not merely from the time the road is completed and trains begin to run. *Georgia P. R'y Co. v. Strickland*, 282.
8. **RAILROAD COMPANY USING STEAM MOTORS CANNOT LAY ITS TRACK LONGITUDINALLY** upon the streets of a town or city, without the sanction of the legislature of the state expressly appearing, or arising from necessary implication. *Daly v. Georgia etc. R. R. Co.*, 286.
9. **FEE TO STREETS IN CITY OF MACON IS IN THE STATE**, and the right to use them for any other than the ordinary use of streets should proceed from the legislature. While a railroad company may have the right, under its charter, to enter the city, it must buy or condemn its right of way like individuals or other corporations, or it must have legislative authority before it can appropriate the streets for laying its tracks and operating its road. *Id.*
10. **RIGHT OF ABUTTING LAND-OWNER TO DAMAGES.** — Whenever, without the consent of the owner of property abutting on a public street, and without compensation to him, an ordinary commercial railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street. *Adams v. Chicago etc. R. R. Co.*, 644.
11. **DAMAGES TO PROPERTY FROM OPERATION OF RAILROAD ON STREET — EVIDENCE.** — In an action by the owner of a lot abutting on a public street to recover damages for injuries to his property by the construction and operation of a railroad on the street, evidence which takes into account not merely the consequences to the lot from operating the rail-

road in front of it, but also from operating the road on the whole or any part of the street, however remote from the lot, is inadmissible, as this would allow the plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself. *Id.*

See MASTER AND SERVANT, 12; MUNICIPAL CORPORATIONS, 8-11; NEGLIGENCE, 2-5, 8, 12, 18.

RECOUPMENT.

See DAMAGES, 2.

REGISTRATION.

See DEEDS, 12.

REMAINDERS.

REMAINDER VESTS WHEN. — It is a general rule that where a particular estate is created by will, with remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the enjoyment of the prior estate determines, and not as designed, in the absence of express words or a manifest intent to that effect, to postpone the vesting of the remainder over. Where, therefore, a testator devised land to his daughter for life, with remainder over in fee to her child or children in case she should survive him, leaving a child or children, and by a subsequent clause of the will devised to his widow a life estate in the same land, and after her death to his right heirs in fee; and the daughter, having survived the testator, died shortly after, leaving a son, who also died, leaving a son, who died unmarried and without issue, leaving the testator's widow, his great-grandmother, as his next of kin, — it was held that the testator's grandson took a vested remainder in fee, which was not affected or cut down by the doubtful expressions in the subsequent clause of the will, and that it passed to the testator's widow upon the death of her great-grandson. *Bruce v. Bissell*, 436.

See WILLS, 1, 5.

REPLEVIN.

1. **IN REPLEVIN, RIGHT OF PARTY TO ALTERNATIVE JUDGMENT** for the value of the property, in case the property itself cannot be obtained, is exclusively for his own benefit, which he may waive if he chooses, and take judgment merely for the return of the property. *Thompson v. Schied*, 619.
2. **DAMAGES.** — ONE WHO HAS RIGHT TO USE OF PERSONAL PROPERTY IS ENTITLED TO RECOVER the value of such use as special damages for the detention of the property. But this rule applies only where the party has the right to the use, and a mortgagee, after default, has a right to the possession only for the purpose of foreclosure or sale under the mortgage, in order to satisfy the debt secured thereby, and not for the purpose of using the property. *Id.*
3. **MEASURE OF DAMAGES IN REPLEVIN.** — Where property consisting of lumber and logs comes into the possession of a third person, of whom the owner demands it, the measure of the latter's recovery is the value of the property at the time and place of the demand and refusal, less any

additional value it may have had by reason of labor bestowed upon it, in good faith, before the demand was made. *Peters etc. Co. v. Lesh*, 367.

RULE IN SHELLEY'S CASE.

See WILLS, 3, 4.

SALES.

1. **SALE TO ONE FRAUDULENTLY PRETENDING TO BE AGENT DOES NOT PASS TITLE WHEN.** — Where one, falsely and fraudulently pretending to be the agent of a third person, as such pretended agent, purchases personal property from a vendor, who intends to vest the title in the supposed principal, the sale is void, and vests no title in such pretended agent, and he cannot, by a subsequent sale, confer title to the property upon another. *Peters Box and Lumber Co. v. Lesh*, 367.
2. **VENDOR OF GOODS NOT ESTOPPED FROM CLAIMING TITLE TO GOODS AS AGAINST PURCHASER FROM IMPOSTOR.** — Where the vendor of personal property, acting under the belief that the purchaser is the agent of another, and that he is selling it to the latter, and, basing his belief upon the representations of the fraudulent purchaser that he is such agent, permits the bill of lading to be made out in the name of such supposed agent, he is not thereby estopped from claiming title to the property as against a purchaser from such supposed agent. *Id.*
3. **RECEIPT OF GOODS IS ONE THING, AND ACCEPTANCE ANOTHER;** receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything is done by the buyer which he would have no right to do unless he were the owner of the goods. *Pierson v. Crooks*, 831.
4. **DELIVERY OF GOODS TO A CARRIER UNDER AN EXECUTORY CONTRACT OF SALE** vests title in the vendee, if they correspond with the contract; but the rule is otherwise where the goods do not so correspond. *Id.*
5. **VENDEE WHO ACCEPTS ARTICLES OF INFERIOR QUALITY** tendered to him, as in fulfillment of an executory contract of sale, is, in the absence of fraud, deemed to assent that they are of the quality to which he is entitled under the contract, and he is precluded from subsequently urging their inferiority. This rule of law imposes on a vendee the duty of inspection before acceptance, if he desires to save his rights, in case the goods are of inferior quality. He cannot reject the goods after acceptance, nor recover damages for their inferior quality. *Id.*
6. **PURCHASER OF GOODS UNDER AN EXECUTORY CONTRACT, WHERE PAYMENT AND ACCEPTANCE ARE BY THE CONTRACT concurrent obligation,** cannot, on the delivery of the goods, pay the purchase-money, and subsequently rescind the acceptance and reject the goods for defects ascertainable on examination. *Id.*
7. **PAYMENT MADE UNDER EXECUTORY CONTRACT OF SALE WILL NOT PRECLUDE THE VENDEE FROM SUBSEQUENTLY REJECTING GOODS** for want of compliance with the contract, if it provided that payment should be made in advance before the delivery or acceptance of the goods. *Id.*
8. **RIGHT OF VENDEE TO REJECT GOODS, WITHIN WHAT TIME MAY BE EXERCISED.** — Where goods are ordered of a certain quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and

the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them. *Id.*

9. **PURCHASER'S DUTY IS TO ACT PROMPTLY IN MAKING AN EXAMINATION OF GOODS SENT UPON HIS ORDER**, to see whether they comply therewith, and to give prompt notice to the vendor of their rejection, if defective. But the vendee has a reasonable time for inspection and to give notice; and this reasonable time is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury of the vendor from delay, as convenience and necessity of the vendee. A delay on the part of the vendee to examine goods shipped to him for ten days after their arrival, and the further delay of some length of time to give notice of their rejection, cannot be said, as a matter of law, to be unreasonable. *Id.*
10. **VENDEE MAY RECOVER MONEYS PAID TO HIS VENDOR UNDER EXECUTORY CONTRACT OF SALE**, and also moneys paid for duties on goods shipped under such contract, where it was necessary to pay such duties to obtain possession of and to properly examine the goods, and such payments were due on the delivery to the vendee of the shipping contract, and such goods, on examination, are found not to conform to the contract, and are seasonably rejected on that account. *Id.*
11. **WARRANTY IS OF QUALITY AT PORT OF SHIPMENT, AND NOT PORT OF DESTINATION**, under a contract evidenced by the following letter from the sellers to the buyers: "We have made sale to you of twelve hundred tons extra Manila sugars, about No. 9 D. S. in color, at 10.10 per ton, f. o. b., and we understand it is your intention to load same on the Republic on her arrival at Manila. . . . It is further understood that the sugar is sold on a basis of 88° pol'r with 3d. per cwt. per degree downward, and fractions of degree in proportion. The sugars to be thoroughly sampled and tested on arrival." *Lord v. Edwards*, 581.
12. **STOPPAGE IN TRANSITU — CARRIER'S LIEN.** — Exercise of the right of stoppage *in transitu* by the vendor of goods is not a rescission of the contract of sale, but a resumption of possession which enables him to insist upon the vendor's lien which he had waived by the delivery to the carrier. In such case the carrier may, as against the consignor, retain the goods by virtue of his lien for carriage, until his charges and expenses between the consignment and stoppage are paid, but he cannot claim a lien thereon for a general balance due by the consignee for the carriage of former consignments from the same vendor. *Pennsylvania R. R. Co. v. American Oil Works*, 885.
13. **DAMAGES — BREACH OF CONTRACT — RIGHT OF ACTION.** — Under a contract to furnish first-class machinery within a certain time, a sale or transfer by the original purchasers will not protect their vendor from duly accounting to them upon a covenant or warranty connected with the purchase of the machinery. In such case, the first purchaser is not divested of his right of defense as against the purchase-money, nor the last purchaser invested with any right against the first vendor. *Van Winkle v. Wilkins*, 299.
14. **DAMAGES — BREACH OF CONTRACT TO FURNISH MACHINERY — WAIVER OF DEFECTS.** — Under a contract to supply certain machinery by a certain time, the purchaser has a right to rely upon its being as contracted for, until it is proved otherwise, and to rely upon the warranty of the manufacturer; and receiving the machinery after the time specified is neither

a waiver of defects therein, nor of damages resulting from its non-delivery in due time. *Id.*

15. A HORSE SWAP IS COMPLETE WHEN THE TERMS OF EXCHANGE HAVE BEEN FINALLY SETTLED, and each party has relinquished possession of one of the animals and acquired possession of the other. For one of the parties afterwards, without consent of the other, to resume possession of his former property, is simply a tort, and does not reinvest him with title. *Cook v. Pinkerton*, 297.

16. A SALE AND DELIVERY TO A THIRD PERSON AFTER SUCH WRONGFUL RESUMPTION OF POSSESSION will confer no title on the purchaser. *Id.*

See STATUTE OF FRAUDS, 3; CONTRACTS, 1-3; EVIDENCE, 2.

SCHOOL DISTRICTS.

See MUNICIPAL CORPORATIONS, 19, 20.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. AGREEMENT TO MAKE A GOOD TITLE IS ALWAYS IMPLIED in executory contracts for the sale of land, and the purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title knowing its defects. His right to an indisputable title does not depend on the agreement of the parties, but is given by law. *Moore v. Williams*, 844.
2. PURCHASER WILL NOT GENERALLY BE COMPELLED TO TAKE A TITLE WHEN THERE IS A DEFECT IN THE RECORD TITLE which can be cured only by resort to parol evidence, or when there is an apparent encumbrance which can be removed or defeated only by such evidence. *Id.*
3. SPECIFIC PERFORMANCE NOT DECREED WHERE TITLE IS NOT MARKETABLE. — Equity will not compel the specific performance of a contract for the purchase of land, if the title thereto is so uncertain as to affect its market value. The court will not compel the purchaser to accept such a title, nor cast upon him the risk of litigation and the embarrassment of a questionable title. *Townshend v. Goodfellow*, 736.
4. CONTRACT FOR SALE OF LAND ENFORCEABLE THOUGH VENDOR HAD NO TITLE WHEN HE MADE IT. — Where a party has no interest in the lands which he agrees to convey, but volunteers to enter into a contract as a mere venture or speculation, he is not a *bona fide* contractor, and a court of equity will not aid him in enforcing it. But one who has acquired an equitable title or interest in the lands, under an executory contract, may make a contract to sell the same to a third party without waiting to obtain his deed; and if the sale is made in good faith, and the title be fully perfected before the time of completing the purchase, it will be sufficient. *Id.*

STATE.

1. SUIT AGAINST STATE. — The rule which forbids suit against state officers because it is in effect a suit against the state applies only where the interest of the state is through some contract or some property right of hers involved, or where her interest is in a suit brought or threatened by her officers in her own name, to enforce some alleged claim of hers. *McWhorter v. Pensacola etc. R. R. Co.*, 220.

2. **SUIT AGAINST STATE — RAILROAD COMMISSIONERS.** — Where a statute provides that railroad commissioners shall make and fix reasonable and just rates of freights and passenger tariffs to be observed by all railroad companies doing business within the state, and shall as soon as practicable furnish each company with a schedule of such charges, a suit to enjoin such commissioners from enforcing such charges, on the ground that they are unreasonable and unjust, is not in itself a suit against the state; but as the statute provides a penalty for the violation of such rates as fixed, and directs such commissioners to sue in the name of the state to recover the penalty, if the bill for an injunction also prays that they be enjoined from instituting such suit, it becomes, in effect, an action against the state, and cannot be maintained. *Id.*

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS IS NOT WAIVED BECAUSE NOT SPECIALLY PLEADED.** It is sufficient for the defendant to deny the alleged agreement without making any reference to the statute. The agreement being denied, the plaintiff must produce legal evidence of its existence. *Feeney v. Howard*, 162.
2. **DENIAL OF CONTRACT SUFFICIENT TO MAKE DEFENSE OF AVAILABLE.** — A denial by a defendant in his answer of the making of the contract upon which the action is brought is sufficient to enable him to avail himself of the defense that the agreement was void under the statute of frauds. *Fontaine v. Bush*, 722.
3. **ACCEPTANCE OF GOODS, TO BE EFFECTUAL TO AVOID EFFECT OF STATUTE OF FRAUDS** as to oral agreements for the sale of personal property, must be something more than a mere receipt of the goods delivered; in the case of an agreement void by force of the statute, an effectual acceptance can be inferred only from some act or course of conduct on the part of the buyer manifesting a present intention to receive the goods in performance of the agreement, and to appropriate them as his own. And even if the buyer at the time of making the void agreement directs that the goods be delivered to a designated common carrier for the purpose of being transported to the place where they are to come into his own hands, and the goods be so delivered and transported, this alone does not bring the case within the statutory exception requiring an acceptance of the goods. *Id.*

STATUTES.

1. **ALL LAWS MUST BE CONTROLLED IN GENERAL OPERATION AND EFFECT BY THE GENERAL FUNDAMENTAL MAXIMS OF THE COMMON LAW**, such as that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. *Riggs v. Palmer*, 819.
2. **VALIDITY — METHOD OF ENACTMENT.** — Where an amended act is passed by both houses of a legislature, but before its approval by the governor as passed other sections of the original bill are added, after which the whole is signed by the proper officers of both houses, and approved by the governor, the whole act is void, if the genuine and spurious portions are so connected in subject-matter that they depend upon each other, and operate together for the same purpose, and the spurious part changes the legal effect of the genuine part. If, however, the two parts are entirely severable, distinct, and independent, the gen-

whole part will be allowed to stand as law, and the spurious portion rejected. *State v. Deal*, 204.

2. **ENACTMENT — GOVERNOR EXERCISES LEGISLATIVE FUNCTION IN APPROVING STATUTES.** — The approval of an act is an essential prerequisite to the enactment of a law, and such approval is performed by the governor in a legislative capacity as part of the law-making power, and not as the law-executing power. *Id.*
4. **VALIDITY — METHOD OF ENACTMENT.** — When an ostensibly perfect bill is submitted to the governor for his action as part of the law-making power, and he approves its several parts collectively, thinking them all valid, and it subsequently appears that some of them are spurious, the whole act will be declared void, unless it clearly appears that the spurious parts are such as not to have influenced the governor in approving the other parts, or that the latter are entirely severable, distinct, and independent of the former. *Id.*
5. **SUBJECT OF "ACT TO REGULATE ACTIONS FOR LIBEL,"** Laws of 1887, chapter 191, is sufficiently expressed in its title. All the provisions of the act relate and are germane to the subject expressed in the title, and proper to the full accomplishment of the object so indicated. *Allen v. Pioneer Press Co.*, 707.
6. **"ACT TO REGULATE ACTIONS FOR LIBEL,"** LAWS OF 1887, CHAPTER 191, DOES NOT CONFLICT WITH CONSTITUTIONAL PROVISION that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." *Id.*
7. **ACT DOES NOT VIOLATE CONSTITUTIONAL PROVISION REQUIRING ITS SUBJECT TO BE EXPRESSED** in its title, because it does not mention in its title other acts which it repeals or alters by implication on account of repugnancy or inconsistency, if all its provisions are germane to the subject expressed in its title. *City of Winona v. School District*, 687.
8. **LAWS PUBLIC IN THEIR OBJECTS MAY BE CONFINED TO PARTICULAR CLASS OF PERSONS**, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy. An act is not, therefore, invalid as being partial and unequal legislation merely because its provisions apply only to publishers of newspapers. *Allen v. Pioneer Press Co.*, 707.
9. **CONSTRUCTION.** — Court is not justified in declaring act of legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect. *Meyer v. Berlandi*, 663.
10. **CONSTRUCTION OF STATUTE.** — It is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. *Riggs v. Palmer*, 819.
11. **CONSTITUTIONAL LAW — DEPENDENT PROVISIONS OF STATUTE — GENERAL RULE OF CONSTRUCTION.** — If the provisions of the act are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them. Within this rule, the whole of the Minnesota mechanic's lien act, chapter 170, laws of 1887, is declared to be void. *Meyer v. Berlandi*, 663.

12. **CONSTITUTIONAL LAW — MECHANICS' LIEN ACT.** — Minnesota mechanics' lien law, chapter 170, laws of 1887, held to be unconstitutional in the following provisions: 1. That part of section 2 subjecting homesteads to liens; 2. Section 3 providing that if a contractor has received his pay from the owner of the property, and owes a debt due on contract to one of his laborers or material-men which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the penitentiary, although he may not be guilty of any fraud; 3. Section 5, making the fact that the person who performed the labor or furnished the material was not enjoined by law by the owner from doing so, conclusive evidence that the labor was performed or material furnished with his consent; 4. That part of section 8 which provides that the deed of the sheriff on a sale under a lien shall take precedence of any other title, and that part of section 10 which provides that no prior encumbrances shall operate until the lien for labor or material is satisfied; 5. Section 11, making it the duty of the courts, when any doubt exists as to the construction of the act, to construe it so as to give the person performing any labor the full amount of his claim. *Id.*
13. **CONSTITUTIONAL LAW — CONSTITUTIONALITY OF STATUTE** cannot be questioned by one whose rights it does not affect, and who has no interest in defeating it. *County Commissioners v. State*, 183.
14. **RETROSPECTIVE LAWS.** — Statute providing that purchaser of property sold for delinquent taxes must, thirty days before the expiration of the time of redemption, or before he applies for a deed, serve a notice setting forth the sale, the amount due, stating when the time for redemption will expire, or when he will apply for the deed, and extending the time for redemption indefinitely until such notice is given, is constitutional, and applies to sales previously made. *Oullahan v. Sweeney*, 172.

See **CONSTITUTIONAL LAW; INJUNCTIONS**, 2, 3.

STOPPAGE IN TRANSITU.

See **CARRIERS**, 3; **SALES**, 1, 2.

STOCK EXCHANGE.

See **EXECUTIONS**, 1, 2.

SUBROGATION.

1. **TRUSTS — RIGHTS OF CO-OBLIGORS.** — Where a note and mortgage are executed to one party in such manner that he holds them in trust for the benefit equally of himself and his co-obligors on another undertaking, the trust inures to the exclusive benefit of any of the co-obligors who pays off the joint obligation. *Curry v. Curry*, 504.
2. **VOLUNTARY PAYMENT BY AGENT.** — An agent who pays money out of his own pocket to protect the estate of his principal in his charge is not a volunteer, and is entitled to all the equities that his principal would be entitled to had he paid the demand himself. *Id.*

See **JUDICIAL SALES**, 4.

SUNDAY.

See **CRIMINAL LAW**, 11.

SURETYSHIP.

1. **COUNTY TREASURER — LIABILITY OF SURETIES ON OFFICIAL BOND OF. —**
A county treasurer held the office for two successive terms, and failed at the end of the second term to account for or turn over to his successor all of the funds then properly chargeable to him. In such case, the sureties upon his bond for the second term are *prima facie* responsible for the deficiency; and if they would relieve themselves from liability upon the ground that the deficiency occurred during the previous term, the burden is cast upon them to show that fact. *County of Pine v. Willard*, 622.
2. **SURETIES OF COUNTY TREASURER FOR HIS SECOND TERM OF OFFICE ARE RESPONSIBLE** for money coming into the treasury during that term, although it was placed there by the officer merely to cover a defalcation of the preceding term held by him. So they would be responsible if the funds received during the second term were misapplied to cover a prior delinquency. *Id.*
3. **SURETIES ON OFFICIAL BOND ARE NOT ANSWERABLE FOR DEFAULTS OF THEIR PRINCIPAL OCCURRING BEFORE ITS DELIVERY.** *People v. Van Ness*, 134.
4. **A BOND EXECUTED UNDER THE DURESS OF THE PRINCIPAL** is void as to the surety also, if the surety acted without knowledge of the duress; and knowledge of the fact of imprisonment does not necessarily involve knowledge of its want of legality. *Patterson v. Gibson*, 356.
5. **IT WAS ERROR TO STRIKE A PLEA SETTING UP A MATERIAL PART OF THE DEFENSE**, to wit, want of knowledge. *Id.*

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANY IS LIABLE FOR FRAUD AND MISFEASANCE OF ITS AGENT**, whom it has intrusted with the duty of transmitting messages over its line, in transmitting a false message, prepared by himself, to a party who receives the message in the usual course of business, and in good faith acts thereon, to his damage. *McCord v. Western U. Tel. Co.*, 636.
2. **TRANSMISSION OF FORGED DISPATCH BY AGENT PROXIMATE CAUSE OF LOSS. —** The local agent of a telegraph company was also the agent of an express company at the same place. He sent a forged dispatch over the line of the telegraph company to a merchant in a neighboring city, requesting the latter to forward money to his correspondent at the former place, to be used in buying grain. The message was received by the merchant, who in good faith forwarded the money by express in the usual course of business, and it was intercepted and abstracted by the agent, and by him converted to his own use. In such case, the proximate cause of the merchant's loss was the sending of the forged dispatch, and the telegraph company was liable, although an action might also have been maintained against the express company. *Id.*
3. **NON-DELIVERY OF TELEGRAM — DAMAGES. —** Where the non-delivery of a telegram in time to enable the party to whom it is sent to meet a train and comply with the direction of the sender does not cause the former party to suffer any damage, but simply to lose a mere opportunity or possibility to make some money, the company is not liable to him in damages for such non-delivery. *Olay v. Western U. Tel. Co.*, 316.

TRADE-MARKS.

DEVICE ADOPTED BY TRADE UNION, WHEN NOT LEGAL TRADE-MARK. — A device or symbol adopted by a cigar-makers' union, having many thousand members, to be placed on boxes of cigars made by such members, which does not indicate by what persons the cigars are made, but only that they are made by some member of such union, where the right to use it belongs equally to each of the members, and continues only so long as he remains a member, is not a legal trade-mark, — 1. Because it is not used to indicate by what persons the articles were made; 2. Because its use is not enjoyed as an incident to any business; and 3. Because there is no exclusiveness in its use or in the right to use it. *Cigar-makers' Protective Union v. Conhaim*, 726.

TRESPASS.

1. **SEVERAL ACTIONS CANNOT BE MAINTAINED TO RECOVER DAMAGES FOR SINGLE AND COMPLETED TRESPASS** upon and injury to an entire tract of land; and a recovery of damages in respect to a portion of the land will bar a subsequent recovery in respect to another portion of the same tract, the cause of action being entire and indivisible. *Pierre v. St. Paul etc. R'y Co.*, 673.
2. **FORM OF VERDICT.** — In trespass *de bonis* against two defendants, if both are found jointly liable for a portion of the goods, and one severally liable for the balance, a verdict according to the facts as found is proper. *Beyerdorf v. Sump*, 678.

See CARRIERS, 13; LANDLORD AND TENANT, 4, 5.

TRIAL.

1. **JUDGE — DISQUALIFICATION OF.** — Under a statute requiring a property interest in the action or its result to disqualify a judge from sitting therein, an interest held by him, in the change of location of a county site, and in common with all the registered voters and citizens of the county, is not a disqualification. *Sauls v. Freeman*, 190.
2. **JUDGE — DISQUALIFICATION.** — Under a statute requiring a property interest in an action to disqualify a judge from sitting therein, the fact that a judge signed a petition on the question of changing the location of a county site will not disqualify him from sitting in and deciding a *mandamus* proceeding instituted by the petitioners to compel the proper officers to call an election on the question of changing such site. *Id.*
3. **INSTRUCTION THAT PLAINTIFF IS ENTITLED TO RECOVER, UNLESS DEFENDANT HAS PROVED AFFIRMATIVE DEFENSE** by a preponderance of the evidence, is correct, in a case where the defendant has withdrawn his general denial. *Phoenix Ins. Co. v. Pickel*, 393.
4. **ORDER OF PROOF IS LARGELY MATTER OF DISCRETION WITH TRIAL COURT**, and therefore evidence which is properly a part of the plaintiff's case in chief may be permitted to be introduced out of its regular order, or even by examination of defendant's witnesses, though not strictly cross-examination, provided the evidence is competent and material, and the defendant is not surprised or otherwise unfairly prejudiced by the departure from the regular order of proof. *Hannen v. Pence*, 717.
5. **BURDEN OF PROOF OF NEGATIVE RESTS ON PARTY WHEN.** — Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. Where, therefore, the right of

a claimant to land rests upon the supposed illegality of a marriage, he must, before he can make good that right, by proper proof, remove every presumption of the legality of such marriage. *Boulden v. McIntire*, 453.

6. **OBJECTION TO EXCLUSION OF EVIDENCE, HOW RESERVED.** — To reserve a question on the ruling of the trial court in excluding the testimony of a witness, a pertinent question must be propounded to him, and upon objection, a statement made to the court as to the testimony which he will give in answer thereto, and an exception must be reserved at the time of the ruling. *Kern v. Bridwell*, 409.

See VERDICTS; WITNESSES.

TRUSTS AND TRUSTEES.

1. **ACTS AMOUNTING TO ACCEPTANCE OF TRUST.** — Where one, as next friend of a married woman, files a bill to set up her equity in her father's estate, and to prevent the marital rights of her husband from attaching thereto, and was decreed by the court to be a trustee, with the title vested in him as trustee for the wife and children, this amounts to an acceptance of the trust by him; and if there was no renunciation of the trust, he would continue to be trustee for the children, and failing to act when he should do so he would be liable to them for his non-action. *Salter v. Salter*, 249.
2. **A TRUSTEE IS NOT RESPONSIBLE FOR THE ACTS OF HIS CO-TRUSTEE IF HE IS PASSIVE MERELY,** and is guilty of no negligence himself; but if he receives the funds of the estate, and either delivers them over to his associate, or does any act by which the funds come into the sole possession and control of the latter, and but for which the latter would not have received them, the former trustee is liable for any loss sustained in consequence of such action. *Bruen v. Gillet*, 764.
3. **IF FUNDS COME INTO THE JOINT POSSESSION OF TRUSTEES, ALL ARE BOUND** to see to their proper application, and are responsible for their misapplication by a common agent, even without their express consent. *Id.*
4. **CO-TRUSTEES OR ASSIGNEES, LIABILITY OF, FOR ONE ANOTHER.** — Where moneys were collected by H., one of two assignees, for the benefit of creditors, and deposited in a bank to the credit of H. and his co-assignee G., but were afterwards withdrawn from such bank, and deposited with H., who was carrying on business as a private banker, and who subsequently became insolvent, it was held that G. was liable for such moneys. *Id.*
5. **LIABILITY OF TRUSTEE FOR MONEYS WHICH HE HAS AIDED IN PLACING IN THE POSSESSION OF HIS CO-TRUSTEES CANNOT BE MADE TO DEPEND** on the good credit of the latter. *Id.*
6. **IF ONE OF THE TWO TRUSTEES RECEIVES MONEYS BY THE JOINT ACT OF HIMSELF AND HIS CO-TRUSTEE,** and other moneys, without the act or aid of his co-trustee, the latter is answerable only for the proper application of the first-named moneys, and may be exonerated from all liability by proving that the first-named moneys were properly applied. The burden establishing such application must be assumed by him. *Id.*
7. **LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY.** — A testator cannot vest property or funds in a trustee for the use of another, so as to exempt it from liability for the debts of the latter, under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be liable for the debts of the beneficiary, the same as if he held the legal estate. *Marshall's Trustee v. Rush*, 467.

8. **LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY.** — A discretion may be given to a trustee in the management and control of the trust estate, and as to the amount of profits to be paid therefrom, and the manner of paying them to the beneficiary, but the rights of the latter's creditors cannot be thereby impaired under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be liable for the debts of the *cestui que trust*, the same as if he held the legal title. *Id.*
9. **LIABILITY OF TRUST ESTATE FOR DEBTS OF BENEFICIARY.** — A trust estate, whether consisting of realty or personalty, may be subjected and sold, or if practicable and to the interest of the parties, the rents, interests, or profits may be subjected and applied by equity to the payment of the debts of the *cestui que trust*, under section 21, article 1, chapter 63, General Statutes of Kentucky, providing that trust estates shall be subject to the debts of the beneficiary, the same as if he held the legal title. *Id.*
10. **TRUSTEE DEMISING PROPERTY WHILE IN SUCH CONDITION AS TO BE A NUISANCE** is guilty of misfeasance, and during the continuance of his estate is answerable for any damages caused thereby, but the beneficiaries under the trust are not responsible for any nuisance created or permitted by him. *Ahern v. Steele*, 778.
11. **STATUTE OF LIMITATIONS — ACTION BY TRUSTEE BARRED.** — By decree of court the title to certain property was vested in a trustee for a wife and her children, and they went into possession of the property, and remained in possession of it for a sufficient length of time to acquire title by prescription, after which the property was sold under an execution, and the purchaser at the execution sale remained in possession longer than the statutory period. In such case an action by the trustee for possession would be barred, and the children would likewise be barred if nothing else appeared. *Salter v. Salter*, 249.

See SUBROGATION.

ULTRA VIRES.

See CORPORATIONS, 2, 11, 12.

USURY.

- A NOTE EXECUTED IN GEORGIA**, but payable in Alabama, waiving homestead and exemptions, and specifying a conventional rate of interest after maturity, which rate was not usurious according to the laws of Georgia, is not, after a general judgment has been rendered thereon in Georgia, open to inquiry, at the debtor's instance, as to whether it was usurious according to the laws of Alabama or not. No exemption right embraced in the waiver, as to property or effects of the debtor found in Georgia, will prevail over the judgment; the note being made since the present constitution was adopted, and being free from usury so far as appears upon its face without going into evidence as to the law of Alabama. *Gamble v. Central R. R. & B. Co.*, 276.

VENDOR AND VENDEE.

1. **AN ACTION IS MAINTAINABLE BY A VENDEE AGAINST A VENDOR TO RECOVER MONEYS PAID TO THE LATTER UNDER AN EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE**, and for expenses of examining the

title to such real estate, if it appears that the property contracted to be sold is apparently subject to a judgment lien, and its exemption from such lien can be shown only by parol evidence of witnesses. *Moore v. Williams*, 844.

2. DISTINCTION BETWEEN GOOD AND MARKETABLE TITLE IS NOT CONFINED TO COURTS OF EQUITY, BUT IS ALSO RECOGNIZED AT LAW, especially if the question concerning title is one of fact, as where the validity of the title or its freedom from an apparent encumbrance can be established only by parol evidence. *Id.*
 3. A GOOD TITLE MEANS not merely a title valid in fact, but a marketable title which can be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for the loan of money. *Id.*
 4. GROWING CROPS NOT BELONGING TO VENDOR OF LAND DO NOT PASS by a sale of the land. *Barrett v. Choen*, 363.
- See AGENCY, 2; EVIDENCE, 5; FRAUD, 3; SPECIFIC PERFORMANCE.

VERDICTS.

MOTION FOR JUDGMENT ON ANSWERS TO INTERROGATORIES NOTWITHSTANDING GENERAL VERDICT will be sustained only where there is a direct conflict between the general verdict and the interrogatories and answers thereto, and where the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment. *Louisville etc. R. R. Co. v. Crunk*, 443.

See DAMAGES, 1; INTEREST; JUDGMENTS, 1, TRESPASS, 2.

WATERCOURSES.

WHERE A STREAM FLOWS THROUGH TWO ADJOINING TRACTS OF LAND, the property of different owners, and in the bed of the stream on the upper tract there was a natural ledge of rock, which retarded the flow of the water so as to protect the lower tract from overflow, the proprietor of the upper tract had no right to remove such ledge of rock, and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions of the same, which but for the alteration would not be so affected. And this is true, although there be no damage at the point where the stream enters the lower tract, but only farther down. *Grant v. Kuglar*, 348.

See COUNTIES, 1; MUNICIPAL CORPORATIONS, 4.

WILLS.

1. CONSTRUCTION. — A devise by a husband to his wife of all his property, of whatever nature, possessed by him at the time of his death, to be held in trust for the sole use and benefit of herself and her child, with the power of alienation taken from her of the realty, except certain portions designated by the will, creates a life estate in the widow for the sole use and benefit of herself and the child named, remainder in fee to such child at its mother's death. *Koenig v. Kraft*, 463.
2. ORAL DIRECTIONS WITH RESPECT TO THE DISTRIBUTION OF PROPERTY. — Will by which a testator gives certain property to a trustee, "to be distributed according to the private instructions I give him," is valid and enforceable, if it appears that the trustee was present when the will was made, and was orally instructed by the testator to distribute such

property among certain persons. If a testator bequeaths property in trust to a legatee, without specifying in the will the purposes of the trust, and at the same time communicates this purpose to the legatee orally or by unattested writing, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud, by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise. *Owby v. Berton*, 157.

3. **SHELLEY'S CASE.** — GEORGIA CODE OF 1862, SECTIONS 2248-2250, UTTERLY ABROGATES the rule in Shelley's case, as a rule of law in limitations over, as to conveyances executed since the code went into effect. *Willerson v. Clark*, 258.

4. **APPLICATION OF RULE IN SHELLEY'S CASE.** — A devise by a father, made and probated prior to the adoption of the Georgia Code of 1862, by which he gave to his married daughter an equal share with others of his children in his estate, adding, "to her benefit during her life, but my will is that (her husband) have no control of her distributive share, but that it be and remain the property of the heirs of her body after her death," passed an estate in fee-simple to the daughter in the lands allotted to her in the distribution of the estate, and her children took no interest by way of remainder, the words "heirs of her body," without qualifying or explanatory terms, being, before the adoption of the code, words of limitation, and not words of purchase. *Id.*

5. **ESTATES — REMAINDERS.** — A devise made by a mother to a trustee for her son in 1854, providing that if the son should die without issue, the trustee was then to sell the property, and equally divide the proceeds, placing the same in the hands of another trustee for the other children of the testatrix, creates a fee in the son determinable only upon his dying without issue, and it was the intent of testatrix that the other children should take by executory devise, and not by contingent remainder, so that no remainder was created by implication in the issue of the son; and neither the latter nor the other children can enjoin the devisee from committing waste on the premises during his lifetime. *Matthews v. Hudson*, 305.

WITNESSES.

WITNESS WHO IS PARTY to a suit may be asked in a general way touching the issues and facts involved. *Van Winkle v. Wilkins*, 299.

See **APPEAL AND ERROR**, 6; **EVIDENCE**, 4.

